

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Appellant,

vs.

C. W. RYAN, as Trustee in Bankruptcy of PUGET  
SOUND ENGINEERING COMPANY, a  
Corporation, Bankrupt.

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District  
Court for the Western District of Wash-  
ington, Northern Division.

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**Names and Addresses of Counsel.**

Messrs. McCLURE & McCLURE, Attorneys for  
Appellant,

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couver, [1\*]

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In the United States District Court for the Western  
District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

**Claim and Petition of the United States Fidelity  
& Guaranty Company.**

To the Honorable JEREMIAH NETERER, Judge  
of the Above-entitled Court:

Now comes the United States Fidelity & Guaranty

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\*Page-number appearing at foot of page of original certified Trans-  
script of Record.

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Company, a corporation, and propounds its claim against the above-named bankrupt, and in respect thereto respectfully represents and petitions the Court as follows:

### I.

That heretofore and on or about July 21, 1919, the above-named bankrupt entered into a contract with the State of Washington for grading, draining and paving with concrete a portion of the Pacific Highway between Salmon Creek and Pioneer (permanent highway No. 2-B) in Clarke County, Washington, wherein and whereby amongst other things said bankrupt did agree with the State of Washington to furnish the material and do and cause to be done said work in accordance with the drawings and specifications attached to said contract and in accordance with the schedule of unit or itemized prices attached thereto, the estimated cost of said improvement being approximately the sum of \$205,485.31, and that in and by said contract the said bankrupt did agree with the State of Washington to execute and furnish to the State of Washington a good and sufficient bond with an approved surety company as surety, said bond to be payable to the State [2] of Washington and to be in the penal sum of the full amount of the contract.

### II.

That thereupon said bankrupt made application to the United States Fidelity & Guaranty Company, claimant and petitioner herein, for the said bond agreed by it to be furnished to the State of Washington, and thereupon and on, to wit, the said 21st

day of July, 1919, said bankrupt as principal and said United States Fidelity & Guaranty Company as surety did make and enter into their joint and several bond in writing in favor of the State of Washington in the penal sum of \$205,485.31, the condition of said bond being that if the said bankrupt should faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein and within the time prescribed therein, and should fully indemnify the State of Washington against any direct or indirect damages that might be suffered or claimed for injuries to persons or property during the construction and improvement of such highway, and until the same should be accepted, and should pay all laborers, mechanics, subcontractors and materialmen and all persons who should supply such contractors or subcontractors with provisions and supplies for the carrying on of such work, and should in all respects faithfully perform said contract according to law, then the said obligation to wit, said bond should be void, otherwise to remain in full [3] force and effect; that upon the execution of said contract and the execution and delivery of said bond, as above alleged, said bankrupt entered upon the performance of said contract and continued therein until, to wit, September 20, 1920; that on said last named date said bankrupt defaulted in the performance of said contract and abandoned and refused to

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carry out the said work and thereupon served notification to that effect upon the State Highway Commissioner.

### III.

That thereupon the State Highway Board of the State of Washington, acting for and in behalf of the State of Washington, terminated the employment of the contractor for the completion of said work and in writing notified said United States Fidelity & Guaranty Company to take over and complete said contract in accordance with the terms thereof.

### IV.

That in and by said contract it was, amongst other things, stipulated and agreed that said bankrupt should complete all the work called for under said contract before the 1st day of July, 1920; that time was the essence of the said contract on the part of the contractor and that in case the contractor should fail in the due performance of the contract by and at the time mentioned or by or at such other time to which the period of completion might have been extended, said bankrupt should be liable to pay to the State of Washington, as and for liquidated damages and not as a penalty, the cost of engineering and inspection, not to exceed the sum of \$25.00 for each and every day which might elapse between the appointed and the actual time of completion.

[4]

### V.

That on and between the 20th day of September, 1920, and the 25th day of September, 1920, said



United States Fidelity & Guaranty Company was compelled to and did advance and pay out for claims due to laborers for work performed, and to materialmen for materials and supplies furnished said bankrupt in the performance of said work, the sum of \$17,945.61, the said United States Fidelity & Guaranty Company taking assignments of said claims to D. H. McCollister as its agent.

## VI.

That on September 25th, 1920, and at the same time the said United States Fidelity & Guaranty Company paid most of the claims for labor and material above mentioned, the bankrupt did make, execute, acknowledge and deliver unto the said United States Fidelity & Guaranty Company a certain bill of sale wherein and whereby said bankrupt did sell, assign, transfer and set over unto the United States Fidelity & Guaranty Company all the personal property consisting of machinery, tools, equipment, materials and supplies of every kind and nature whatsoever, owned and possessed by the bankrupt and located upon said work, for the purpose of enabling said United States Fidelity & Guaranty Company to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was immediately thereafter recorded and is now of record in Book "E" Record of Bills of Sale, on page 401 of the records in the auditor's office of Clarke County, Washington, and immediately upon the execution and delivery to it of said bill of sale the said United States Fidelity & Guaranty Company entered upon and took posses-

sion of all the work under said contract and undertook [5] to complete said contract, the value of the material and supplies so turned over to the United States Fidelity & Guaranty Company by the Bankrupt under said bill of sale being the sum of \$12,000.00, and the value of the equipment so turned over to the United States Fidelity & Guaranty Company by the bankrupt being \$10,000.00.

#### VII.

That said contract was fully completed by the United States Fidelity & Guaranty Company and was accepted by the State of Washington on February 1, 1921.

#### VIII.

That on September 20, 1920, at the time when said bankrupt abandoned said contract, there was withheld by the State of Washington as reserve percentages under the contract the sum of \$29,350.30; that within thirty days after the completion of said contract by the United States Fidelity & Guaranty Company, various persons claiming to have furnished labor, material and supplies to the bankrupt in the work provided for by said contract filed claims with the State of Washington in sums aggregating a total of \$24,864.17.

#### IX.

That the total amount expended by the United States Fidelity & Guaranty Company in the completion of said contract and in the payment of claims for wages, material, provisions and supplies was \$70,997.68; that the United States Fidelity & Guaranty Company received from the State of



Washington, as the balance due under said contract, the sum of \$45,579.77, and received the further sum of \$3,369.17 on account of cement sacks returned, making the total loss of the United States Fidelity & Guaranty Company in the completion of said contract the sum of \$22,048.74. [6]

X.

That in the completion of said contract all of the material and supplies and a large part of the equipment sold, assigned and transferred to the United States Fidelity & Guaranty Company by said bankrupt were entirely used and consumed and that a portion only of the machinery, tools and equipment remained in the possession of said United States Fidelity & Guaranty Company at the time of such completion.

XI.

That thereafter and on, to wit, the 11th day of March, 1921, the said United States Fidelity & Guaranty Company commenced an action in the Superior Court of the State of Washington for Thurston County, wherein said United States Fidelity & Guaranty Company was plaintiff and James Allen as State Highway Commissioner, C. W. Clausen as State Auditor, Clifford L. Babcock as State Treasurer of the State of Washington, C. W. Ryan as Trustee in Bankruptcy of the bankrupt herein, and all of the persons who had filed claims with the State Highway Commissioner against the bankrupt and said bond given by the United States Fidelity & Guaranty Company were made defendants, for the purpose of having fixed

and established by said Court the claims of said claimants respectively against the reserve percentages withheld by the State of Washington in the sum of \$29,538.30 and against the bond furnished by the said bankrupt and United States Fidelity & Guaranty Company and wherein the said United States Fidelity & Guaranty Company prayed judgment that the said claimants so filing claims be required to appear before the said court and establish their several claims against said reserve percentages and against said bond; that the claim of said United States Fidelity & Guaranty Company for the sums advanced by it for the purpose of paying the claims of laborers, material and supply men be established as against said reserve percentages and that said United States Fidelity & Guaranty Company be adjudged and decreed to have a lien upon said reserve percentages [7] and also a lien prior, paramount and superior to the interests of the trustee in bankruptcy of the bankrupt in, on and against all that portion of the plant, machinery, tools, equipment, material and supplies transferred and assigned to said United States Fidelity & Guaranty Company under the bill of sale above mentioned.

## XII.

That the said C. W. Ryan as trustee in bankruptcy filed his answer and cross-complaint in said above-entitled action wherein and whereby, amongst other things, the said trustee in bankruptcy alleged in substance: That said bankrupt was insolvent on September 25, 1920, at the time it gave to the said United States Fidelity & Guar-

anty Company the bill of sale conveying to it said material, supplies and equipment above mentioned; that said property was so transferred and delivered to said United States Fidelity & Guaranty Company by said bankrupt for the purpose of securing and indemnifying the United States Fidelity & Guaranty Company against the liability and obligation of its suretyship upon the bond above mentioned; that the liability and obligation of said United States Fidelity & Guaranty Company as surety upon said bond had already been incurred, and that said transfer was in payment of or in security for the payment of an antecedent obligation, and that the said transfer was made within four months before the filing of the petition in bankruptcy against said bankrupt; that the said United States Fidelity & Guaranty Company knew, or had reasonable cause to believe, that on said September 25, 1920, the said bankrupt was insolvent, and that the making, executing and delivery of said bill of sale and the transfer of said property would, in effect, enable the said United States Fidelity & Guaranty Company to receive a greater percentage of its debt than any other creditor or creditors of the said bankrupt of the same class, and that the said bill of sale and the transfer of said property effected a preference and were void as against the trustee in bankruptcy. [8]

### XIII.

That said United States Fidelity & Guaranty Company, for answer to the cross-complaint of said

C. W. Ryan, as trustee in bankruptcy, denied each and every allegation thereof.

#### XIV.

That thereafter said cause came duly and regularly on for trial before said Superior Court and such proceedings were then had that on, to wit, November 21, 1921, the said Superior Court did make and cause to be entered its judgment wherein and whereby it did, amongst other things, adjudge and decree as follows:

That to various claimants for labor, material and supplies there should be paid out of said reserve percentages the sum of \$15,921.91, with interest thereon at the rate of 6% per annum from March 2, 1921, and the taxable costs and disbursements of each of them.

That to the Union National Bank of Seattle there should be paid out of said reserve percentages the sum of \$3,000.00 together with interest thereon at the rate of 7% per annum from February 19, 1921, and its taxable costs and disbursements.

That the remainder of the fund constituting the reserve percentages should be paid to the United States Fidelity & Guaranty Company, and that the amount so received from said fund by the United States Fidelity & Guaranty Company was the sum of \$9,040.57. [9]

#### XV.

That deducting the said sum of \$9,040.57 from the loss of \$22,048.74 sustained by the said United States Fidelity & Guaranty Company made a net

loss of \$13,008.14 to the said United States Fidelity & Guaranty Company.

## XVI.

That in and by said judgment said Superior Court further adjudged and decreed that the said bill of sale made, executed, acknowledged and delivered by said bankrupt conveying to the United States Fidelity & Guaranty Company the machinery, tools, equipment, materials and supplies, was a chattel mortgage on said property as security for the balance due and owing to the United States Fidelity & Guaranty Company above mentioned, and ordered and directed that an order of sale issue from said court, directed to the sheriff of Clarke County, Washington, ordering, directing and requiring said sheriff to sell said personal property in the manner provided by law and to apply the proceeds of said sale upon the payment of the balance due the United States Fidelity & Guaranty Company, and that all right, title and interest of C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, was subject and inferior to the rights and claims of the said United States Fidelity & Guaranty Company in said property. [10]

## XVII.

That thereafter said C. W. Ryan as trustee in bankruptcy as aforesaid appealed to the Supreme Court of the State of Washington from that portion of said judgment wherein it was by said Court adjudged and decreed that the said bill of sale was a chattel mortgage and that the right, title and



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interest of the said C. W. Ryan as trustee in bankruptcy was subject and inferior to the rights of the United States Fidelity & Guaranty Company as established by said judgment, and did not appeal from any other part of said judgment.

#### XVIII.

That thereafter the matter of said appeal having been duly and regularly submitted to the Supreme Court of the State of Washington, said Supreme Court did make and cause to be filed and entered its decision and opinion wherein and whereby said Supreme Court reversed the decision of said Superior Court, a copy of which said opinion is hereto annexed, marked Exhibit "A" and is hereby referred to and hereby made a part hereof, and that thereafter and on to wit, the 30th day of July, 1923, pursuant to the mandate of said Supreme Court, the Superior Court of the State of Washington did make and enter its certain judgment wherein and whereby judgment was entered in said court in favor of the said C. W. Ryan as Trustee in Bankruptcy and against the said United States Fidelity & Guaranty Company, for the sum of \$22,000.00 together with the costs in said Supreme Court and said Superior Court, and that sixty days have not since then elapsed.

#### XIX.

The United States Fidelity & Guaranty Company, as claimant and petitioner herein, respectfully submits to the Court that by [11] taking over and assuming the completion of said contract upon the default of the bankrupt it preserved and



saved to the estate of said bankrupt the said reserved percentages and obtained the application thereof to the payment of debts incurred by said bankrupt on said work, when otherwise, under the terms, provisions and conditions of said contract with the State of Washington, the State of Washington was entitled to and could have used and appropriated the whole of said reserved percentages for the purpose of completing said contract.

### XX.

And the said United States Fidelity & Guaranty Company as claimant and petitioner herein further represents and shows to the Court that by taking over and assuming the completion of said contract upon the default of said bankrupt, said United States Fidelity & Guaranty Company saved and protected the estate of said bankrupt from the penalties provided by said contract in behalf of the State of Washington by way of charges and penalties for noncompletion of said contract within the time stipulated in said contract.

### XXI.

That by reason of the premises aforesaid, there is due and owing to the United States Fidelity & Guaranty Company from said bankrupt, and the estate of said bankrupt, the sum of \$13,008.17, the net loss sustained by it as hereinbefore alleged, and in addition thereto the sum of \$22,000.00, the value of the supplies and equipment taken and used by it under the bill of sale as aforesaid, as adjudged and decreed by the Superior Court of the State of Washington, making a total of \$35,008.17; that said

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United States Fidelity & Guaranty Company has received from the sale of a portion of said equipment mentioned in said bill of [12] sale the sum of \$5,095.00, and has received on account of cement sacks returned by it, being a part of the material and supplies mentioned in said bill of sale, the sum of \$2,975.87, making a total of \$8,070.87, and making its total claim against said bankrupt and the estate of said bankrupt the sum of \$26,937.30.

#### XXII.

And said United States Fidelity & Guaranty Company further represents and shows to the Court that the account between it and the said bankrupt was and is a mutual, open and current account and that, as provided by the terms and provisions of Section 68 of the Bankruptcy Act, this claimant is entitled to have set off against said liability in favor of the Trustee in Bankruptcy under the judgment entered by the Superior Court of Thurston County, as above alleged, the whole of its said claim of \$26,937.30.

#### XXIII.

And said United States Fidelity & Guaranty Company, as petitioner and claimant as aforesaid, respectfully represents and shows to the Court that the said C. W. Ryan as trustee in bankruptcy as aforesaid, as claimant and petitioner is informed and believes, threatens to, and is about to, cause to be issued from the said Superior Court of Thurston County a writ of execution to enforce payment by the claimant and petitioner of the amount due upon said judgment without granting or allowing

the claimant and petitioner the setoff allowed to it by Section 68 of the Bankruptcy Act, as aforesaid, and in violation of its rights under said act; that by reason of the premises aforesaid an emergency exists and that an order to show cause should be issued by this Court restraining and enjoining the said C. W. Ryan, as trustee in bankruptcy, from issuing execution upon said judgment or taking any steps whatsoever to enforce the collection of said judgment until the rights of the [13] claimant and petitioner to the set off herein claimed shall have been adjudicated and determined by this court.

WHEREFORE said United States Fidelity & Guaranty Company, as claimant and petitioner aforesaid, respectfully prays an order and judgment of this Court as follows:

1. That hearing be had herein after due notice and that at such hearing the Court order, adjudge and decree that the said United States Fidelity & Guaranty Company as claimant and petitioner herein is entitled to set off against all liability under said judgment of said Superior Court of Thurston County its claim in the sum of \$26,937.30 or so much thereof as shall be allowed and established by the Court.

2. That in case for any reason the petition of said United States Fidelity & Guaranty Company to set off its said claim against said judgment shall be overruled or denied by the Court, the claimant and petitioner's claim against said bankrupt es-

tate be allowed in the sum of \$26,937.30 or in such other sum as the Court shall determine.

3. That a time and place be fixed by the Court for the hearing of this petition and that the said C. W. Ryan as trustee in bankruptcy be ordered and required then and there to show cause why the prayer of this petition should not be granted and that in the meantime, and until further order, the trustee be stayed, restrained and enjoined from taking any proceedings whatsoever to enforce collection or payment of said judgment of the Superior Court of the State of Washington for Thurston County by levy, seizure, execution or other process.

4. That the United States Fidelity & Guaranty Company as claimant and petitioner herein have such further order, judgment and decree of the Court as to the Court shall seem meet and proper.

McCLURE & McCLURE,

Attorneys for United States Fidelity & Guaranty Company. [14]

#### XXIV.

That no part of said debt has been paid except as stated; that there are no setoffs or counterclaims to the same except as stated; that no note or other evidence of said indebtedness has been given by said bankrupt and no note or other evidence of said indebtedness has been received by said petitioner; that no judgment has been recovered for or on account of said claim except as stated; that the petitioner has not nor has any person by its order, or to its knowledge or belief, for its use, had

or received any manner of security for said debt whatever except as stated.

Above amendment to petition allowed by Court August 30, 1923, trustee's counsel consenting thereto.

FRANK S. DIETRICH,  
Judge. [15]

State of Washington,  
County of King,—ss.

C. H. Campbell, being first duly sworn, on oath deposes and says: That he is assistant manager of the United States Fidelity & Guaranty Company, the claimant and petitioner above named, and makes this affidavit in behalf of said claimant and petitioner for the reason that said claimant and petitioner is a corporation and he is such general officer; that he has read the foregoing petition and claim, and does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

C. H. CAMPBELL.

Subscribed and sworn to before me this 22d day of August, A. D. 1923.

[Notarial Seal] WALTER A. McCLURE,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [16]

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**Opinion.**

PARKER, J.—This equity suit was commenced in the Superior Court for Thurston County by the



plaintiff guaranty company, looking to the adjudication of a number of claims asserted against it as surety upon a bond executed by it to the State of Washington to secure the performance of a public highway construction contract by the Puget Sound Engineering Company. We are here concerned only with the claim of title asserted by the defendant, C. W. Ryan, as trustee in bankruptcy of the engineering company, to certain equipment and supplies belonging to it and taken over by the guaranty company upon the abandoning of the contract. A trial in the Superior Court resulted in a judgment and decree which in part awards to the guaranty company a lien, and foreclosure thereof, upon the equipment and supplies, upon the theory that the guaranty company has a lien thereon in the nature of a pledge or chattel mortgage accompanied by possession, superior to the claim of title asserted by Ryan as trustee in bankruptcy for the engineering company. From so much of the judgment as decrees such award of lien to the guaranty company, Ryan, as trustee, has appealed to this court; claiming that he is entitled to a money judgment against the guaranty company for the value of such equipment and supplies so taken over by it from the engineering company, as for conversion thereof.

On July 21, 1919, the engineering company entered into a construction contract with the state for the grading and paving of a section of the Pacific highway in Clarke County, agreeing to do such construction work and furnish all necessary labor, equipment and supplies therefor for a stated con-



sideration. The following provisions of the contract are the only portions thereof we need here particularly notice:

“IV. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the State Highway Commissioner shall be at liberty, after three (3) days’ written notice to the Contractor, to provide any such labor or materials and deduct the cost thereof from any moneys then due or thereafter to become due to the Contractor under this contract; and if the State Highway Commissioner shall consider that such refusal, neglect or failure is sufficient ground for such action, he may, by written notice to the Contractor and to his Surety or its representatives, terminate the employment of the Contractor for said work, and enter upon the premises and take possession of all materials, tools and appliances thereon, for the purpose of completing the work included under this contract, and employ, by contract or otherwise, any person or persons to finish the work, and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, he shall not be entitled to receive any further balance of the amount to be paid under this contract until the work shall

be fully finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the State Highway Commissioner in finishing the work, such excess shall be paid by the State to the Contractor, but if such expense shall exceed unpaid balance, the Contractor shall pay the difference to the State Treasurer."

On the same day, in pursuance of stipulations in the contract, the engineering company, as principal, and the guaranty company as its surety, executed a bond to the state in the sum of \$205,485, conditioned, following appropriate references to the contract, as follows: [17]

"Now, therefore, if the Principal herein shall faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and shall well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein, and within the time prescribed therein, and shall indemnify the State of Washington against any direct or indirect damages that shall be suffered or claimed, for injuries to persons or property during the construction and improvement of such highway, and until the same is accepted, and shall pay all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such contractor or sub-contractors with provisions and supplies for the

carrying on of such work, and shall in all respects faithfully perform said contract according to law, then this obligation to be void, otherwise to remain in full force and effect.”

On the same day, the engineering company executed and delivered to the guaranty company an indemnity agreement reading in part as follows:

“In consideration of the United States Fidelity and Guaranty Company (hereinafter called the Company) becoming surety on the bond of the Puget Sound Engineering Company (hereinafter called the Applicant) herein applied for, the Applicant hereby covenants and agrees

. . .

“And for the better protection of said Company, the Applicant does, as of the date hereof, hereby assign, transfer and convey to the said Company, all the right, title and interest of the Applicant in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, . . . authorizing and empowering said Company, its authorized agents or attorneys to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be

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in full force and effect, as of the date hereof, should the Applicant fail to be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on its part under the said contract.”

This indemnity agreement was never officially recorded, either as a bill of sale or chattel mortgage. Soon thereafter the engineering company entered upon the performance of the contract and continued in such performance until about September 20, 1920, when it abandoned the work before completion thereof. On September 23, 1920, the engineering company, by written communication, notified the State Highway Board as follows:

“We are very sorry to have to advise you that for reasons beyond our control we are unable to proceed further with our contract for the construction of (here follows an appropriate reference to the work to be done under the contract).”

Thereupon the State Highway Board notified the guaranty company of the abandonment of the work by the engineering company and demanded of the guaranty company that it complete the work according to the construction contract for the performance of which it became surety. On September 25, 1920, in pursuance of a resolution of the board of directors of the engineering company, that company executed a bill of sale conveying to the guaranty company all of its equipment and supplies located along, upon or about the portion of the

highway covered by the construction contract. That bill of sale contained, among other [18] things, the following recital:

“It is understood that the party of the second part became a surety upon the bond which the party of the first part was required to give unto the State of Washington, for the faithful performance of a road contract between the points mentioned and heretofore described, and that the party of the first part has been unable, and is unable to complete the said road contract, and that the same has been required to be completed by the party of the second part, under the terms of its bond given unto the State of Washington, and that for the consideration above mentioned, and in pursuance to the contract existing between the party of the first part and the party of the second part entered into at the time the bond was given, all of this said personal property is being delivered and sold and transferred to the party of the second part for the purpose of enabling it to have and to hold the same, and the better to equip it to perform the said contract in accordance with the contract existing between the party of the first part, the party of the second part, and the State of Washington.”

On the same day, and in pursuance of the same resolution of its board of directors, the engineering company executed a second bill of sale conveying to the guaranty company five certain automobile trucks and one trailer, then at the place of the work,



evidently not intended to be conveyed by the first bill of sale; **which trucks and trailer** were held by the engineering company under conditional sales contracts, and hence liable to be reclaimed by the original vendors thereof; it being recited in that bill of sale that the guaranty company assumes no obligation to pay any balance due upon such conditional bills of sale. This seems to be the reason for the conveying of the engineering company's interest in these motors and trailer apart from the conveyance of the other property mentioned in the first bill of sale. Both of these bills of sale were duly placed on record in the auditor's office for Clarke County on September 30, 1920. Possession was taken by the guaranty company of all of the property described in these two bills of sale, immediately following their execution. At no prior time did the guaranty company ever take possession of any of the equipment or supplies in question. Soon thereafter the guaranty company caused the work under the construction contract to be proceeded with; the performance of which works was continued until its completion and the acceptance thereof of the State Highway Board on about February 1, 1921.

The property conveyed by the engineering company to the surety company by these two bills of sale was used and largely consumed or lost by the surety company in the completion of the work. The supplies were practically all so consumed, while the equipment was, to a large extent, consumed by being worn out, except as to the autotrucks and the trailer, which were repossessed by the original vendors



thereof under their conditional sales contracts, so that only a portion of all the equipment and supplies that was so taken over by the surety company remained in its hands after the completion of the work, and that portion apparently much depreciated in value by its use in the completion of the work. At the time of the abandoning of the work by the engineering company, it had incurred indebtedness for labor and materials in the prosecution of the work exceeding \$22,000 in amount. The guaranty company afterwards paid out approximately that sum in satisfaction of such claims, as it was required to do as surety.

On November 22, 1920, an involuntary petition in bankruptcy was filed against the engineering company in the federal court of this district, and such proceedings were had thereon that on December 16, 1920, the engineering company was adjudged by that Court to be bankrupt [19] and Ryan was thereupon appointed trustee of its property accordingly. As such trustee he thereafter demanded of the guaranty company that it deliver to him all of the equipment and supplies taken over by it under the bills of sale on September 25, 1920, which it, as we have seen, was almost wholly unable to do, and which it refused to do. Upon the commencement of this action in March, 1921, the trustee filed his answer therein demanding that the title to such property be decreed to be in him as of September 25, 1920, that the guaranty company be required to account for the value thereof, and that a money judgment be rendered against it in his favor accordingly; the issue so

made being determined by the trial court in favor of the guaranty company, as we have already noticed.

The principal contentions made in behalf of the trustee are, in substance, that, on September 25, 1920, when the guaranty company took over the possession of the equipment and supplies under the bills of sale from the engineering company, that company, was then insolvent, of which fact the guaranty company had reasonable cause to believe; and that therefore such transfer, being within four months prior to the filing of the petition in bankruptcy in the federal court, was void as an unlawful preference and subject to be set aside at the suit of the trustee, under the provisions of the federal bankruptcy law, and under the trust fund doctrine of this state relating to the rights of creditors of insolvent corporations.

The principal contentions made in behalf of the guaranty company are, in substance, that the transfer by the bills of sale and surrender of possession of the equipment and supplies to that company by the engineering company on September 25, 1920, related back and became effective in law as of the time of the execution of the above-quoted indemnity agreement on July 21, 1919, and that therefore such transfer was not void or voidable under the four months' rule of the federal bankruptcy law. Also that the engineering company was in fact not insolvent on September 25, 1920, when the transfer was made by the bills of sale and surrender of possession of the equipment and supplies, and that the

guaranty company had no reasonable cause to believe that the engineering company was then insolvent or likely to become insolvent by reason of such transfer or otherwise; and that therefore such transfer was not void or voidable as a preference under the federal or state law. Also that the transfer of the equipment and supplies was made for a present consideration passing from the guaranty company to the engineering company, consisting of the payments by the guaranty company of the claims incurred by the engineering company in the prosecution of the work, in an amount equal to or greater than the value of the equipment and supplies so transferred, and that therefore the transfer was not void or voidable as a preference. Also that the guaranty company became subrogated to all of the rights of the state entitling it to take over the equipment and supplies under the terms of Section 4 of the construction contract above quoted, and that therefore it should not be required to account to the trustee therefore.

We first inquire, was the engineering company insolvent on September 25, 1920, when it executed the bills of sale for, and surrendered possession of, its equipment and supplies to its surety, the guaranty company? It seems to us that there is little room for argument on this question. On September 23, 1920, the engineering company advised the state highway board that "for reasons beyond our control we are unable to proceed further with our contract . . . ." At about the same time the guaranty company was well advised of the engineering

company's inability to proceed with the work, and also that such inability was because of the financial embarrassment of that company. This was shown by the testimony of an agent of the guaranty company who had investigated the affairs of the engineering company. In the [20] resolution of the board of directors of the engineering company authorizing and directing the transfer of its equipment and supplies to the guaranty company, it is recited, as the reason for making such transfer, "It appearing manifest to the board of directors of this company that this company will not be able to complete the said contract." The first and principal bill of sale by the engineering company to the guaranty company executed on September 25, 1920, contains a recital in substance the same as this.

While these recitals in the resolution and the bill of sale do not in terms tell us that the engineering company's admitted inability to proceed further with the work under the contract was because of its financial inability to do so, it is plain, we think, from the other evidence in the case, and especially that of the guaranty company's own agent, that such confessed inability to proceed on the part of the engineering company was because it was unable to meet its financial obligations already incurred, and necessary to be incurred by it in the performance of its obligations under the construction contract. We are quite convinced that it is thus made plain by the evidence, not only that the engineering company was insolvent on September 25, 1920, when it transferred its equipment and



supplies to the guaranty company, but that that company then had actual knowledge of such insolvency. We decide this question apart from the fact of the later adjudication of the bankruptcy of the engineering company rendered by the Federal Court in the bankruptcy proceedings. We are assuming that that adjudication was not conclusive of the insolvency of the engineering company on September 25, 1920.

Was the transfer of the equipment and supplies effected on September 25, 1920, made for a present adequate consideration then, and not before then, passing to the engineering company? It is so contended in behalf of the guaranty company, with a view of demonstrating that there was no unlawful preference effected, as there might have been in the securing or satisfying of antecedent debts. Now it seems to be well settled that a surety liable for the default of his bankrupt principal becomes a creditor of such principal and the estate being administered in bankruptcy. 2 Black on Bankruptcy (3d ed.), Sec. 577. Just when such surety becomes such creditor may not be readily determinable under all circumstances, but we think it safe to assert that such surety becomes a creditor of his bankrupt principal, in any event, not later than the default of his principal, which fixes the liability upon him as surety. It might be said that up to that time the surety's liability is only potential, but we think his liability cannot, in any event, be so viewed thereafter. By the principal's default the surety's liability becomes fixed, though it

may be unliquidated as to amount. It follows, we think, that the guaranty company became a creditor of the engineering company not later than the default of that company in the performance of its construction contract, which plainly occurred not later than September 23, 1920, two days before the transfer of its equipment and supplies to the guaranty company by the execution of the bills of sale and surrender to that company of its equipment and supplies on September 25, 1920. We conclude that that transfer was not supported by any consideration then passing from the guaranty company to the engineering company, and that whatever the guaranty company then or thereafter did or promised to do toward the satisfaction of the engineering company's obligations under the construction contract, whether in the payment of claims theretofore incurred in the carrying on of the work, or in the carrying on of the work thereafter, was nothing more than the guaranty company was obligated to do under its bond which obligation had become fixed and not contingent upon the default of the engineering company on September 23, 1920. [21]

Should the transfer of the equipment and supplies finally effected by the bills of sale and surrender of possession on September 25, 1920, be held as relating back to and becoming effective as of the time of the making of the indemnity agreement of July 21, 1919, above quoted, viewing that agreement as, in form, a bill of sale for, or a chattel mortgage upon, the equipment and supplies? It



is so contended on behalf of the guaranty company, with a view of avoiding the effect of the four months' rule of the federal bankruptcy law. The answer to this question depends upon the validity of the indemnity agreement as a bill of sale or chattel mortgage, as against the trustee. We have seen that whatever interest the guaranty company acquired in the equipment and supplies by virtue of that agreement was only such interest as could be acquired therein by virtue of that agreement alone, unaccompanied by transfer of possession, and also unaccompanied by any official record thereof such as is required by our statutes relating to the recording of bills of sale and chattel mortgages. Of course, we are now concerned only with the question of the validity of that indemnity agreement as against the trustee. Prior to the passage of the amendment of 1910 to the federal bankruptcy law, the federal courts had adopted the view that a trustee in bankruptcy took no better title than that possessed by the bankrupt; so that whatever claim of title could be enforced as against the grantee, before he was adjudged bankrupt, could also be enforced as against the trustee; the law then existing being so finally settled by the decision of the federal supreme court in *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, rendered in 1906. By the amendment of 1910 to Sec. 47 of the bankruptcy law, there was embodied therein, touching the property rights acquired by the trustee in bankruptcy, the following:

“Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.”

In *Pacific State Bank vs. Coats*, 205 Fed. 618, decided by the federal Circuit Court of Appeals for the Ninth Circuit in 1913, we find the following pertinent observations touching this amendment to the bankruptcy law:

“It is the purpose of this amendment to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. ‘The class of cases, unprovided for by the original act, and intended to be reached by the amendment,’ says Mr. Collier in his work on *Bankruptcy* (9th ed.) p. 659, ‘was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the poten-

tial rights of creditors potential with such liens.' 'This provision of the Bankruptcy Act,' says Witner, Judge, in *Re Hartdagen* (D. C.) 189 Fed. 546, 549, 26 Am. Bankr. Rep. 532, 535, 'Puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor,' distinguishing the case of *York Mfg. Co. vs. Cassell*, 201 U. S. 344, 26 Sup. Ct. Rep. 481, 50 L. Ed. 782, and others of its character, which it is thought inspired the amendment."

In *Potter Mfg. Co. vs. Arthur*, 220 Fed. 843, the federal Circuit Court of Appeals for the Sixth Circuit observed: [22]

"Under the rule of *York vs. Cassell*, *supra*, this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to section 47a (2), providing that as to property 'in custody' the trustee 'shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings'; and, of course, the nature and extent of these 'rights, remedies and powers' must be determined by the law of the state, where not inconsistent with the Bankruptcy Act. There is general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in *York vs. Cassell* (*Remington*, vol. 3, Secs. 1137 and 1212½; *Loveland* (4th ed.) vol. 1, p. 767); and we think it clear

that such was the effect and that the trustee stands in the place of each creditor, and may assert the rights which any creditor would have had against the property 'in custody,' if that creditor, at the date of filing the petition in bankruptcy had been holding an execution levy."

Among numerous federal court decisions adhering to this view of the effect of the 1910 amendment, we note the following: Fairbanks Steam Shovel Co. vs. Wills, 240 U. S. 642; National Bank of Bakersfield vs. Moore, 247 Fed. 913; In re Schilling, 251 Fed. 966.

It is the law of the state that "A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property," unless placed of record within ten days after its execution in the office of the county auditor of the county wherein the property is situated (Sec. 3780, Rem. Comp. Stat.); and, also, that "no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers where the property is left in the possession of the vendor," unless it be recorded in the office of the county auditor of the county wherein the property is situated, within ten days after the sale (Sec. 5827, Rem. Comp. Stat.).

It seems plain to us, in the light of these provisions, that the guaranty company did not acquire any interest of any nature, by way of lien or otherwise, in the equipment and supplies of the engineer-

ing company under the indemnity agreement of July 21, 1919, except as between themselves, because of the want of recording of that agreement and the want of possession of the property being taken thereunder by the guaranty company before September 25, 1920, the date of the execution of the bills of sale and that that company did not even then acquire any interest in the equipment and supplies as against the trustee, if he then became vested with such title thereto for the benefit of the creditors of the bankrupt engineering company as is given to trustees in bankruptcy by the terms of the 1910 amendment of the federal bankruptcy law above quoted. Section 60 of the bankruptcy law sheds light upon this branch of our inquiry. It reads in part as follows:

“(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

“(b) If a bankrupt shall have . . . made a transfer of any of his property, and if, at the



time of the transfer, . . . or of the recording or registering of the transfer if by law recording or registering [23] thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.”

It seems to us, since the engineering company was insolvent, and known to be such by the guaranty company, at the time of the attempted final transfer of the equipment and supplies to the guaranty company on September 25, 1920; since that transfer occurred within four months prior to the filing of the petition in bankruptcy in the federal court on November 22, 1920; and since that transfer, if given effect, would work a preference in favor of the guaranty company, of which fact we are convinced, though not argued by counsel, other than that any such preference would not be unlawful, that the transfer became voidable at the suit of the trustee in the interest of the creditors of the bankrupt engineering company. In other words, the trustee became, by relation, as of date prior to the transfer of the equipment and supplies on September 25th,

“vested with all the rights, remedies and powers of a creditor holding a lien” against the equipment and supplies. Our decision in *Benner vs. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702, is in its reasoning, we think, all but conclusive in favor of the trustee upon this point. The decision of the federal district court for the western district of Washington, in *In re Puget Sound Engineering Co.*, 270 Fed. 353, cites and follows our decision in the *Benner* case.

Contention is made in behalf of the guaranty company that, in any event, it became subrogated to the right of the state to appropriate and use the equipment and supplies upon the default of the engineering company, because of the terms of section 4 of the construction contract above quoted; and that, having so used the equipment and supplies it should not now be held accountable for the value thereof to the trustee, further than for the proceeds of the sale of the remaining small portion of such equipment which is contemplated by the trial court's judgment to be made, and the proceeds thereof to be applied on its claim as a surety creditor of the engineering company. Several of our own decisions are cited to support this contention. We think, however, the holdings of those decisions, in so far as they can be considered as shedding lights in our present inquiry, are, in substance, that when, by the terms of a public improvement contract, the state or municipality is clearly required to withhold funds applicable to the payment of the contractor as a trust fund for the payment of those

furnishing labor and supplies, giving to such person preferred claims against such funds superior to that of the contractor, a surety of the contractor having paid such preferred claims is entitled to the portion of such funds as the persons whose claims it so pays were entitled to; and that when, by the terms of a public improvement contract, the state or municipality is not clearly required to so withhold funds applicable to the payment of the contractor, but is merely given an option to do so, one who may pay those furnishing labor and supplies upon the work does not acquire any such preferred claim against the fund which may remain in the hands of the state or municipality applicable to the payment of the contractor. *State ex rel. Bartelt vs. Liebes*, 19 Wash. 589, 54 Pac. 26; *Dowling vs. Seattle*, 22 Wash. 592, 61 Pac. 709; *First National Bank vs. Seattle*, 71 Wash. 122, 127 Pac. 837; *Maryland Casualty Co. vs. Washington National Bank*, 92 Wash. 497, 159 Pac. 689; *Northwestern National Bank vs. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, Ann. Cas. 1918D, 644; *National Surety Co. vs. American Savings Bank & Trust Co.*, 101 Wash. 213, 172 Pac. 264; *Denham vs. Pioneer* [24] *Sand & Gravel Co.*, 104 Wash. 357, 176 Pac. 333; *Beyer vs. Zindorf*, 116 Wash. 199, 198 Pac. 977.

Evidently it is by way of analogy that counsel for the guaranty company now hope to make their present contention effective, for we do not have here any question of a preference claim of the guaranty company against funds in the hands of

the state applicable to the payment of the engineering company as contractor. If there be some analogy between claimed rights of a surety to funds in the hands of the state applicable to the payment of his principal as contractor and claimed rights of the surety to the equipment and supplies of his principal contractor on hand at the time of such contractor's default still we are quite unable to see that such a claim to equipment and supplies can be tested other than by the terms of the construction contract. Now, by the terms of this construction contract, it seems plain to us that the state was in no sense obligated, upon the default of the engineering company, to take over the equipment and supplies on hand in trust for the benefit of the guaranty company as surety for the engineering company, or anyone else. It is true that the state could have rightfully taken over the equipment and supplies on hand if it choose to do so, and use them towards the completion of the contract; but it was not obliged to do so in the interest of anyone. No trust obligation whatever rested upon the state in that behalf, as when the state contracts to withhold funds for the benefit of labor or supply claims. The state could ignore all of the equipment and supplies of the engineering company then on hand and acquire other equipment and supplies for the finishing of the work, if it cared to finish the work itself, without being in the least liable on that account to anyone. Or it could ask and allow the guaranty company to complete the work, assuming an attitude of entire indifference as to whether the

guaranty company would use the equipment of the engineering company then on hand, which course the state elected to follow. This construction contract did not, by its terms, go further than to give the state the privilege as a mere option to "enter upon the premises and take possession of all materials, tools and appliances thereon, for the purpose of completing the work," using the language of the contract.

We conclude that the state, by the terms of the contract, did not become a trustee for the guaranty company for the performance of any such service in the interests of that company; and that the guaranty company should now be required to account to the trustee in bankruptcy for the value of the equipment and supplies, which manifestly was the property of the engineering company unencumbered by any trust resting thereon in the interests of anyone other than the state, which voluntarily abandoned whatever right it had to such property, as it was authorized to do by the construction contract.

It is now insisted in behalf of the trustee that a money judgment should be entered against the guaranty company, upon the record made in this case, for the value of the equipment and supplies taken over by that company from the bankrupt engineering company on September 25, 1920, as for an accounting by that company for such equipment and supplies. We agree that such a money judgment should be awarded to the trustee against the guaranty company because of its appropriation



of the equipment and supplies of the bankrupt engineering company. The Trial Court made no findings as to the value of the equipment and supplies so taken over by the guaranty company; evidently because it deemed such finding unnecessary in view of its disposition of the case. A careful review of the evidence touching the question of such value leaves us in considerable doubt as to its amount, [25] especially as to its amount chargeable to the guaranty company. We have concluded, however, in the light of such evidence as we have in the record, to fix the value of the equipment at \$10,000 and the value of the supplies at \$12,000, as chargeable against the guaranty company because of its appropriation thereof. In fixing such chargeable value as against the guaranty company, we have taken into consideration the fact that the trucks and trailer were lost to it by reason of them being repossessed by the original vendors thereof under their conditional sales contracts; such loss of the trucks and trailer being without legal fault of the guaranty company.

Our final conclusion, therefore, is that the judgment and decree of the Trial Court should be reversed, in so far as it awards to the guaranty company any interest in, or lien upon, the equipment and supplies; and that a money judgment should be awarded in favor of the trustee in bankruptcy and against the guaranty company in the sum of \$22,000. It is so ordered. The case is remanded to the Superior Court for further proceedings consistent with our views herein expressed. This con-

clusion, and all that we have said in this opinion, shall, of course, be hereafter considered as being wholly without prejudice to the rights of the guaranty company as a creditor entitled to share as such in the bankrupt estate; this, as we view it, being a question wholly within the province of the federal court to decide in the bankruptcy proceedings.

MAIN, C. J., FULLERTON, MACKINTOSH and TOLMAN, JJ., concur.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [26]

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In the United States District Court for the Western  
District of Washington, Northern Division.

No. 6460.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEERING  
COMPANY, a Corporation, Bankrupt.

**Order to Show Cause on Petition of United States  
Fidelity & Guaranty Company and Restraining  
Order.**

On reading the petition of the United States Fidelity & Guaranty Company, a corporation, verified August 22d, 1923, on file herein and upon all the proceedings had in this cause, on motion of McClure & McClure, attorneys for the petitioner,

IT IS ORDERED:

1. That C. W. Ryan, as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, the above-named bankrupt, be and appear and show cause before this Court at the courtroom thereof in the United States courthouse at Seattle, Washington, in said District, on the 30th day of August, A. D. 1923, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why he, the said trustee, should not be stayed, enjoined and restrained from taking any proceedings to enforce collection or payment of a certain judgment entered July 30th, 1923, by the Superior Court of the State of Washington for Thurston County, in favor of the trustee and against the petitioner in cause No. 7974 on the records of said Superior Court, said cause being entitled United States Fidelity & Guaranty Company against James Allen, C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, et al., and said judgment being in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs. [27]

2. That the said C. W. Ryan, as trustee, as aforesaid, then and there show cause why the said United States Fidelity & Guaranty Company as claimant and petitioner herein is not entitled to set off against all liability under said judgment of said Superior Court of the State of Washington for Thurston County its claim in the sum of \$26,937.30 or so much thereof as shall be allowed and established by the Court, and further show cause, in

case said setoff shall be denied, why said claim shall not be allowed in the sum of \$26,937.30 or such other sum as the Court shall determine.

3. That in the meantime, and until further order, the trustee be and he is hereby stayed, restrained and enjoined from taking any proceedings whatsoever to enforce collection or payment of said judgment by levy, seizure, execution or other process.

4. That delivery, on or before five (5) days from the date hereof, of a copy of said order duly certified by the clerk, together with a copy of the petition certified by the attorneys of the petitioner to the said trustee by any person qualified to serve a summons under the laws of the State of Washington, shall be sufficient in service in the premises.

Done in open court this 22d day of August, A. D. 1923.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [28]

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In the United States District Court for the Western  
District of Washington, Northern Division.

In Bankruptcy—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation, Bankrupt.

**Affidavit in Compliance With Order to Show Cause.**

United States of America,  
District and State of Washington,  
County of Clarke,—ss.

Comes now C. W. Ryan, trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, a bankrupt, and in compliance with the order to show cause issued in the above-entitled court on the 22d day of August, 1923, upon being duly sworn, on oath says:

That on or about the 11th day of March, 1921, there was filed by the petitioner herein for an order to show cause, the United States Fidelity & Guaranty Company, a corporation, as plaintiff, a complaint against C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, bankrupt, this affiant, et al., in the Superior Court of the State of Washington, for Thurston County, a copy of which complaint is herewith attached and marked Exhibit "A" and prayed to be read as a part hereof.

Thereafter the affiant, C. W. Ryan, as trustee in bankruptcy, as aforesaid, filed in said Superior Court of the State of Washington, for Thurston County, an answer, copy of which answer is herewith attached and prayed to be read as a part hereof and marked Exhibit "B."

And thereafter the said United States Fidelity & Guaranty [29] Company, a corporation, filed in said cause a reply to said answer, copy of which



reply is herewith attached marked Exhibit "C" and prayed to be read as a part hereof.

That said pleadings in said cause heretofore referred to constituted and made an issue in said cause, which issue was tried out before the said Superior Court of the State of Washington for Thurston County and resulted in a decision in favor of said United States Fidelity & Guaranty Company, a corporation, plaintiff, and against the affiant, one of said defendants, wherein it was ordered that said affiant, as trustee in bankruptcy herein, recover nothing from said plaintiff; that thereafter this affiant, as trustee in bankruptcy herein, appealed said cause to the Supreme Court of the State of Washington, notice of which appeal is hereto attached and marked Exhibit "D," and said matter by said Supreme Court of the State of Washington was duly heard upon appeal, both the plaintiff and this affiant herein appearing, and that said Supreme Court of the State of Washington having jurisdiction of said cause, after due consideration, reversed the action of the Superior Court of the State of Washington for Thurston County in granting judgment in favor of plaintiff and against the defendant, and remanded said cause to said Superior Court with instructions to enter judgment against the plaintiff in favor of your affiant as trustee, defendant in said suit, for the sum of \$22,000.00.

That thereafter the plaintiff herein filed a petition for rehearing before the Supreme Court of the State of Washington in said cause and said rehearing was denied, whereupon the Supreme

Court of the State of Washington caused to be filed with the Superior Court of the State of Washington for Thurston County a *remittitur* directing the said Superior Court to enter judgment against the United States Fidelity & Guaranty Company, a corporation, plaintiff therein, and in favor of the affiant as trustee of the Puget Sound Engineering Company, a corporation, bankrupt, in the sum of \$22,000.00. [30]

That thereafter on the 30th day of July, 1923, the Superior Court of the State of Washington for the County of Thurston entered judgment in the following words and figures, to wit:

“The above-entitled cause having been tried before this Court, and a judgment entered herein on the 21st day of November, 1921, from which judgment an appeal was taken by C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, and such appeal thereafter prosecuted in the Supreme Court of the State of Washington, in so far as said judgment failed to give judgment in favor of said C. W. Ryan, as trustee, etc., as against the plaintiff, and said judgment upon appeal having been by the Supreme Court of the State of Washington ordered reversed as to that portion thereof contained under paragraphs V and VI thereof, and the said cause remanded to this court with instructions to enter judgment in accordance with the opinion of said Supreme Court heretofore filed, and a *remittitur* having been filed herein on the 14th day of July, 1923, attached to which is the opinion of said Supreme Court, which

68 *United States Fidelity & Guaranty Company*  
*remittitur* is in the following words and figures,  
to wit:

“ ‘In the Supreme Court of the State of Washing-  
ton.

May Session, A. D. 1923.

‘BE IT REMEMBERED, That at a regular session  
of the Supreme Court of the State of Washing-  
ton, begun and holden at Olympia on the sec-  
ond Monday of May, A. D. 1923, it being the  
fourteenth day of said month, among other the  
following was had and done, to wit:

No. 17326.

UNITED STATES FIDELITY & GUARANTY  
COMPANY,

Respondent,

vs.

JAMES ALLEN et al.,

Defendants.

C. W. RYAN, as Trustee in Bankruptcy for the  
PUGET SOUND ENGINEERING COM-  
PANY,

Appellant.

JUDGMENT.

Friday, July 13, 1923.

‘This cause having been heretofore submitted to  
the Court, upon the transcript of the record of the  
Superior Court of Thurston County, and upon the  
argument of counsel, and the Court having fully

considered the same, and being fully advised in the premises, it is now on this 13th day of July, A. D. 1923, on motion of McMaster, Hall & Schaefer, counsel for appellant, considered, adjudged and decreed, that the judgment of the Superior Court be and the same is hereby reversed and remanded with instructions to enter judgment in accordance with the opinion heretofore filed, with costs; the petition for rehearing denied, [31] and that the said C. W. Ryan, as trustee, etc., have and recover of and from the said United States Fidelity & Guaranty Company, the costs of this action taxed and allowed at Two Hundred Fifty-one and 95/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

‘I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is true copy of the judgment and decree in said cause, as the same now remains of record in my office.

‘IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Olympia, this 13th day of July, A. D. 1923.

[Seal]

FRED S. GUYOT,

Dep. Clerk of the Supreme Court of the State of Washington.’

“NOW THEREFORE, by virtue of the law and the premises aforesaid, it is by the Court

ORDERED, CONSIDERED, ADJUDGED AND  
DECREEED

that C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, have and recover of and from said United States Fidelity & Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland, the sum of Twenty-two Thousand Dollars (\$22,000.00), together with costs taxed by the Supreme Court of the State of Washington at Two Hundred and Fifty-one and 95/100 Dollars (\$251.95) and costs taxed herein at Thirteen Dollars (\$13.00); and that execution issue therefor.

“Dated in open court this 30th day of July, 1923,  
A. D.

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Judge.” [32]

C. W. RYAN.

Subscribed and sworn to before me, a notary public for the State of Washington, County of Clarke, this 27th day of August, 1923.

[Seal]

CHARLES W. HALL,

Notary Public for Washington, Residing at Vancouver.

SIDNEY TEISER,

McMASTER, HALL & SCHAFER,

Attorneys for Trustee C. W. Ryan. [33]



**Exhibit "A."**

In the Superior Court of the State of Washington  
for the County of Thurston.

No. —.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner;  
C. W. CLAUSEN, as State Auditor; CLIFF-  
FORD L. BABCOCK, as State Treasurer;  
C. W. RYAN, as Trustee in Bankruptcy of  
Puget Sound Engineering Company, a Cor-  
poration; A. N. ALLEN, Sole Trader, Doing  
Business Under the Trade Name of ALLEN  
GARAGE; ALLEN & LEWIS, a Corpora-  
tion; C. E. BRALEY and L. B. CUSICK,  
Partners Doing Business Under the Firm  
Name of BRALEY & CUSICK; J. G. BEN-  
NETT, Sole Trader, Doing Business Under  
the Trade Name of BENNETT HARD-  
WARE COMPANY; M. BARDE & SONS,  
INC., a Corporation; J. L. BROCK; CLYDE  
EQUIPMENT COMPANY, a Corporation;  
J. W. CRAMER, Sole Trader, Doing Busi-  
ness Under the Trade Name of MAPLE-  
WOOD DAIRY FARM; F. T. CROWE &  
CO., a Corporation; COAST STEEL & MA-  
CHINERY CO., a Corporation; CONTRAC-

TORS' MACHINERY & STORAGE CO., a Corporation; P. A. CHRISTENSON and LLOYD A. CHRISTENSON, Partners, Doing Business Under the Firm Name of CHRISTENSON & SON; E. G. DITLEVSEN, Sole Trader, Doing Business Under the Trade Name of SANITARY MEAT MARKET; GEORGE L. DUBOIS, W. B. DUBOIS and JOS. J. DONOVAN, Partners, Doing Business Under the Firm Name of DUBOIS MILL COMPANY; DANVILL CO., a Corporation; CHARLES DAHL and L. PENNE, Partners, Doing Business Under the Firm Name of DAHL & PENNE; F. L. EVANS; I. N. FLEISCHNER, M. FLEISCHNER, M. A. MAYER, SAM SIMON, JOSEPHINE HIRSCH, SANFORD HIRSCH and NATHAN STRAUSS, Partners, Doing Business Under the Firm Name of FLEISCHNER, MAYER & CO.; FEENAUGHTY MACHINERY CO., a Corporation; FULLINWIDER MEAT COMPANY, a Corporation; GREELY'S FORD GARAGE, a Corporation; GREAT NORTHERN RAILWAY CO., a Corporation; GEORGE GODDARD; ELIZABETH GODDARD; W. FOSTER HIDDEN and OLIVER M. HIDDEN, Partners, Doing Business Under the Firm Name of HIDDEN BROS.; HONEYMAN HARDWARE CO., a Corporation; H. E. JOHNSON; J. P. LEE; A. B. McCOY, Sole Trader, Doing

Business Under the Trade Name of McCOY AUTO CO.; [34] MARSHALL-WELLS CO., a Corporation; J. M. MURPHY and B. C. THOMPSON, Partners, Doing Business Under the Firm Name of MURPHY & THOMPSON; MITCHELL, LEWIS & STAVEN CO., a Corporation; MEESE & GOTTFRIED COMPANY, a Corporation; NIKUM & KELLY SAND & GRAVEL CO., a Corporation; NORTHERN PACIFIC RAILWAY CO., a Corporation; PACIFIC DERRICK & HOIST CO., a Corporation; R. H. O'NIELL, C. L. PECK and B. McCORMACK, Partners, Doing Business Under the Firm Name of PECK-O'NIELL LUMBER CO.; PORTLAND MACHINERY CO., a Corporation, RIDGEFIELD STATE BANK, a Corporation; JOHN A. ROEBLINGS SONS CO. OF CALIFORNIA, a Corporation; L. CLAY SPARKS, M. RENIE SPARKS and HARRY W. SPARKS, Partners, Doing Business Under the Firm Name of SPARKS HARDWARE CO.; L. CLAY SPARKS, M. RENIE SPARKS and HARRY W. SPARKS, Partners, Doing Business Under the Firm Name of SPARKS AUTO SUPPLY CO.; JOHN A. SAUERMAN, Sole Trader, Doing Business Under the Firm Name of SAUERMAN BROS.; V. U. HERMAN, Sole Trader, Doing Business Under the Firm Name of SALMON CREEK GARAGE; STANDARD

OIL CO., a Corporation; WILLIAM TENNY; UNION BRIDGE CO., a Corporation; LEWIS SHATTUCK and E. E. SLERET, Partners, Doing Business Under the Firm Name of UNIVERSAL AUTO CO.; UNITED STATES RUBBER COMPANY, a Corporation; UNION NATIONAL BANK OF SEATTLE, a Corporation; UNION OIL COMPANY OF CALIFORNIA, a Corporation; VANCOUVER NATIONAL BANK, a Corporation; WEBBER MACHINE WORKS, a Corporation; THE WESTERN SALES CO., INC., a Corporation; WINTERS & BROOKINGS, a Corporation; HARRY WOLFE; ZIMMERMAN-WELLS-BROWN CO., a Corporation,

Defendants.

### COMPLAINT.

Plaintiff complains and alleges:

#### I.

That at all the times in this complaint mentioned plaintiff was and now is a corporation organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company and has paid to the State of Washington its annual corporation license fee last due.

II.

That at all the times in this complaint mentioned the defendant James Allen was and now is Highway Commissioner of the State of Washington, and the defendant C. W. Clausen was and now is Auditor of the State of Washington, and that the defendant Clifford L. Babcock now is Treasurer of the State of Washington.

III.

That at all the times in this complaint mentioned the following named defendants were and now are respectively partners doing business under the following partnership names, respectively:

C. E. Braley and L. B. Cusick as Braley and Cusick.

P. A. Christenson and Lloyd A. Christenson as Christenson & Son. [35]

Charles Dahl and L. Penne as Dahl & Penne.

Geo. L. DuBois, W. B. DuBois and Jos. J. Donovan as DuBois Mill Company.

I. N. Fleischner, M. Fleischner, M. A. Mayer, Sam Simon, Josephine Hirsch, Sanford Hirsch and Nathan Strauss as Fleischner, Mayer & Co.

W. Foster Hidden and Oliver M. Hidden as Hidden Bros.

J. M. Murphy and B. C. Thompson as Murphy & Thompson.

R. H. O'Niell, C. L. Peck and B. McCormack as Peck-O'Niell Lumber Co.

L. Clay Sparks, M. Renie Sparks and Harry W. Sparks as Sparks Hardware Co.



L. Clary Sparks, M. Renie Sparks and Harry W. Sparks as Sparks Auto Supply Co.

Lewis Shattuck and E. E. Sleret as Universal Auto Co.

#### IV.

That at all the times in this complaint mentioned the following named defendants were and now are respectively doing business as sole traders under the following trade names, respectively:

A. N. Allen as Allen Garage.

J. G. Bennett as Bennett Hardware Company.

J. W. Cramer as Maplewood Dairy Farm.

E. G. Ditlevsen as Sanitary Meat Market.

V. U. Herman as Salmon Creek Garage.

A. B. McCoy as McCoy Auto Co.

John A. Sauerman as Sauerman Bros.

#### V.

That at all the times in this complaint mentioned the following named defendants were and now are corporations organized and existing under the laws of the following states, respectively:

Under the laws of the State of Washington:

F. T. Crowe & Co.

Contractors' Machinery & Storage Co.

Danvill Co.

Fullinwider Meat Company.

Greeley's Ford Garage.

Pacific Derrick & Hoist Co.

Ridgefield State Bank.

Webber Machine Works.

Under the laws of the State of Oregon:

Allen & Lewis.

M. Barde & Sons, Inc.

Coast Steel & Machinery Co.

Feehaughty Machinery Co.

Honeyman Hardware Co.

Mitchell, Lewis & Staver Co.

Nikum & Kelly Sand & Gravel Co.

Portland Machinery Co.

Union Bridge Co.

The Western Sales Co., Inc.

Winters & Brookings.

Zimmerman-Wells-Brown Co.

Under the laws of the State of California:

Messe & Gottfried Company.

John A. Roeblings Sons Co. of California.

Standard Oil Co.

Union Oil Company of California.

Under the laws of the State of New Jersey:

Marshall-Wells Co.

United States Rubber Company.

Under the laws of the State of Maine:

Clyde Equipment Company.

Under the laws of the State of Minnesota:

Great Northern Railway Co. [36]

Under the laws of the State of Wisconsin:

Northern Pacific Railway Co.

Under the National Banking Act:

Vancouver National Bank.

Union National Bank of Seattle.

## VI.

That at all the times in this complaint mentioned the Puget Sound Engineering Company was and now is a corporation organized and existing under

the laws of the State of Washington with its principal place of business at Seattle, King County, in said state, and that December 16, 1920, it was adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in cause No. 6460 on the records of said court, on an involuntary petition filed in said court and cause November 22, 1920, and that said bankruptcy cause was December 16, 1920, referred by said Court to the Honorable C. R. Hawkins, Referee, at Seattle, for further proceedings as provided by law, and that February 1, 1921, at the first meeting of creditors of said corporation, held, after due notice, before the referee in bankruptcy, C. W. Ryan was duly appointed trustee in bankruptcy of said bankrupt, and thereupon duly qualified and entered upon the discharge of his duties as such trustee, and ever since has been and now is the duly appointed, qualified and acting trustee of said bankrupt.

## VII.

That on or about the 21st day of July, 1919, the Puget Sound Engineering Company, a corporation, and the State of Washington, acting through the State Highway Board, under and by virtue of Chapter 186 of the laws of 1909 of the State of Washington, made and entered into a certain agreement in writing wherein and whereby the said Puget Sound Engineering Company, a Corporation, agreed to do all the work and furnish all the material for grading, draining and paving with con-

crete a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), Clarke County, Washington, Post Road Project No. 34, between station 257+30.6 and station 606+60 in accordance with and as described in the plans, general stipulations and specifications attached thereto, for the price set forth in the proposal and schedule of rates and prices attached to said contract. A copy of said contract and the documents thereto attached (omitting the plans and specifications) is hereto annexed marked Exhibit "A" and is hereby referred to and hereby made a part hereof.

### VIII.

That the State of Washington, for the purpose of securing the performance of said contract by said Puget Sound Engineering Company, required a surety bond from said company in the full amount of the contract conditioned for the faithful performance thereof according to law.

### IX.

That thereupon the Puget Sound Engineering Company made application to the plaintiff for said bond and that thereafter and on or about July 21, 1919, upon said application, the plaintiff executed and delivered to the Puget Sound Engineering Company its bond conditioned as aforesaid in the full amount of said contract price; and that the Puget Sound Engineering Company thereupon delivered said bond to the State of Washington and that said bond ever since has been, and now is, on file with the State of Washington. A copy of said bond is

hereto annexed marked Exhibit "B" and is hereby referred to and made a part hereof.

X.

That at the time this plaintiff made, executed and delivered the surety bond hereinabove mentioned, and as a part of the same transaction, the said Puget Sound Engineering Company made, executed and delivered to plaintiff in writing said company's agreement of indemnity, in which among other things said Puget Sound Engineering Company did stipulate and agree with the plaintiff as follows:

In consideration of the United States Fidelity and Guaranty Company (hereinafter called the Company) becoming surety on the bond of the Puget Sound Engineering Company (hereinafter called the Applicant) herein applied for, the Applicant hereby covenants and agrees to pay in advance the premiums \* \* \* annually for the contract bond, and an additional premium to be adjusted and paid upon completion of the contract, based on any increase of the original contract [37] price; such annual payments to be made until it shall deliver to said company at its Home Office in the city of Baltimore, competent written evidence of its discharge from such suretyship and from all liability by reason thereof. In further consideration of its becoming surety as above, the Applicant hereby covenants and agrees to indemnify the Company and save it harmless against all loss, cost, damage, charge, and ex-



pense that may accrue to it, whether sustained or incurred by reason of any act, default or neglect of the Applicant, or on account of claims made under or in connection with the said bond or any extension or continuation thereof; the Applicant agreeing to repay to said Company all such loss, cost, damage, charge and expense, including the fees or other compensation and expenses of any or all attorneys and agents employed by it to investigate or adjust such claims.

And for the better protection of said Company, the Applicant does, as of the date hereof, hereby assign, transfer and convey to the said Company, all the right, title and interest of the Applicant in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, hereby assigning and conveying also all its rights in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, and authorized and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts and enforce use and enjoy such possession upon the following conditions, viz.: This

assignment shall be in full force and effect, as of the date hereof, should the Applicant fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on its part under the said contract.

In further consideration of the execution of the said bond, the Applicant hereby agrees, as of this date, that the said Company shall, as surety on said bond, be subrogated to all its rights, privileges and properties as principal and otherwise in said contract, and it hereby assigns, transfers and conveys to said Company all the deferred payments, and retained percentages, and any and all moneys and properties that may be due and payable to the Applicant at the time of such breach or default, or that may thereafter become due and payable to it on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said Company and to be by it credited upon any loan, cost, damage, charge and expense sustained or incurred by it as above under its bonds of suretyship.

We hereby further agree that the vouchers or other evidence of payments made by the said Company under its obligations of suretyship shall be conclusive against the Applicant, of the fact and extent of the liability of the Ap-

plicant to the said Company under said obligation, whether said payments were made to discharge a penalty thereunder, incurred in the investigation of a claim made thereon, adjusting a loss or claim in connection therewith, or in completing the work covered by said contract, and whether voluntarily made or paid after suit and judgment against said Company.

### XI.

That upon the execution and delivery of said contract and bond as hereinabove set forth the defendant Puget Sound Engineering Company entered upon the performance of said contract and continued therein until, on, to wit, September 20th, 1920. On said last named date said defendant Puget Sound Engineering Company defaulted in the performance of said contract and abandoned and refused to carry out and complete the same and served notification to that effect upon the State Highway Commissioner.

### XII.

That thereupon the State Highway Board cancelled and terminated said contract and all rights of the defendant the Puget Sound Engineering Company to complete or carry out the same, and in writing notified this plaintiff to take over and complete said contract in accordance with the terms thereof.

### XIII.

That this plaintiff upon investigation discovered that said Puget Sound Engineering Company was

in default in payments of claims of laborers for work and labor performed upon said contract and in payment of claims for materials and supplies, the plaintiff did thereupon pay to the individual laborers for work performed for said Puget Sound Engineering Company their various claims, and did pay certain of said claims for materials and supplies, taking assignments thereof to D. H. McColister as agent for this plaintiff, the total amount so paid by this plaintiff as aforesaid being the sum of Seventeen thousand nine hundred and forty-five dollars and 61 cents (\$17,945.61). [38]

## XIV.

That on September 25th, 1920, and at the same time this defendant paid a large part of the laborers' claims as aforesaid, this plaintiff entered upon and took possession of all the work under said contract, and thereupon and as part of that transaction the said Puget Sound Engineering Company did turn over and deliver the said work to the plaintiff, and did, pursuant to the indemnity agreement mentioned and referred to in paragraph X hereof, make, execute, acknowledge and deliver unto this plaintiff its certain bill of sale wherein and whereby the said Puget Sound Engineering Company did sell, assign, transfer and set over unto this plaintiff all the personal property, consisting of machinery, tools, equipment, materials and supplies of every kind and nature whatsoever, owned and possessed by said Puget Sound Engineering Company and located upon said highway for the purpose of enabling this plaintiff to have and to

hold the same and to equip it to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was thereafter filed in the office of the auditor of Clarke County, Washington, on the 30th day of September, A. D. 1920, at the hour of 2:01 o'clock P. M., and was thereafter recorded in Book E, Records of Bills of Sale, on page 401, of the records of said Clarke County; and at the same time and place and as part of the same transaction the said Puget Sound Engineering Company did make, execute, acknowledge and deliver unto this plaintiff a bill of sale in writing conveying to this plaintiff all of the right, title and interest of said Puget Sound Engineering Company in certain trucks and trailers held and possessed by said Puget Sound Engineering Company under certain contracts of conditional sale, which said last named bill of sale was thereafter filed for record in the auditor's office of Clarke County, Washington, on the 30th day of September, 1920, at two o'clock P. M., and was thereafter recorded in volume E of Bills of Sale, at page 400, records of said Clarke County; and that the said supplies, material, tools, plant and equipment so taken possession of by this plaintiff on said September 25th, 1920, ever since have been and are now in the possession of this plaintiff with the exception of such portions thereof as were used, exhausted and worn out in the completion of said contract, and with the exception of certain of said trucks which have been repossessed by the holders of the contract of conditional sale above mentioned.



## XV.

That on September 20, 1920, the total amount earned by said Puget Sound Engineering Company under said contract with the State of Washington aforesaid was the sum of one hundred fifty-eight thousand two hundred eighty-eight and  $49/100$  dollars (\$158,288.49), of which there had been paid unto said Puget Sound Engineering Company the sum of one hundred thirty-eight thousand one hundred eighty-four and  $67/100$  dollars (\$138,184.67), and the sum of thirty-two thousand forty-six and  $16/100$  dollars (\$32,046.16), was held and retained by the State of Washington as the twenty per cent (20%) required and provided by section VII of said contract to be retained until claims against said contract and against the bond given by this plaintiff shall have been satisfied and paid and receipted for in full; that included in said Thirty-two thousand forty-six and  $16/100$  Dollars (\$32,046.16) is the sum of One thousand nine hundred forty-two and  $34/100$  Dollars (\$1,942.34) earned by this plaintiff in completing said contract after said work had been abandoned by said Puget Sound Engineering Company, and its contract cancelled and terminated by the State Highway Board, as herinabove alleged, which sum of One thousand nine hundred forty-two and  $34/100$  Dollars (\$1,942.34) belongs to this plaintiff.

## XVI.

That the plaintiff entered upon the completion of said work immediately after the cancellation and termination of said contract by the State Highway

Board, as hereinabove alleged, and that said work was fully completed by the plaintiff and was accepted by the State of Washington on February 1st, 1921; that the following named defendants within thirty (30) days after the date of the completion and acceptance of said work as aforesaid filed with the defendant James Allen as State Highway Commissioner claims against said contract and against the bond given by this plaintiff as surety for labor, material and supplies furnished in the construction of said work as follows:

A. N. Allen, sole trader, doing business under the trade name of Allen Garage .....	\$ 421.94
Allen & Lewis, a corporation .....	319.00
C. E. Braley and L. B. Cusick, partners doing business under the firm name of Braley & Cusick.....	66.95
J. G. Bennett, sole trader, doing business under the trade name of Bennett Hardware Company .....	186.01
[39]	
M. Barde & Sons, Inc., a corporation....	654.35
L. J. Brock .....	18.00
Clyde Equipment Company, a corporation .....	554.50
J. W. Cramer, sole trader, doing business under the trade name of Maplewood Dairy Farm .....	60.00
F. T. Crowe & Co., a corporation .....	1,780.29
Coast Steel & Machinery Co., a corporation .....	160.00

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Contractors' Machinery & Storage Co., a corporation .....	500.00
P. A. Christenson and Lloyd A. Christ- enson, partners, doing business un- der the firm name of Christenson & Son .....	876.19
E. G. Ditlevsen, sole trader, doing busi- ness under the trade name of Sani- tary Meat Market .....	296.95
George L. DuBois, W. D. DuBois and Jos. J. Donovan, partners, doing business under the firm name of Du- Bois Mill Company .....	640.46
Danvill Co., a corporation .....	210.00
Charles Dahl and L. Penne, partners, do- ing business under the firm name of Dahl & Penne .....	68.63
F. L. Evans .....	390.00
I. N. Fleischner, M. Fleischner, M. A. Mayer, Sam Simon, Josephine Hirsch, Sanford Hirsch, and Nathan Strauss, partners, doing business un- der the firm name of Fleischner, Mayer & Co. ....	117.25
Feenaughty Machinery Co., a corpora- tion .....	48.89
Fullinwider Meat Company, a corpora- tion .....	12.68
Greely's Ford Garage, a corporation ...	138.08
Great Northern Railway Co., a corpora- tion .....	208.33

Great Northern Railway Co., a corporation (assigned to Vancouver National Bank, a corporation) . . . . .	330.67
George Goddard . . . . .	140.00
Elizabeth Goddard . . . . .	225.00
W. Foster Hidden and Oliver M. Hidden, partners, doing business under the firm name of Hidden Bros. . . . .	410.48
Honeyman Hardware Co., a corporation	226.88
H. E. Johnson . . . . .	175.00
J. P. Lee . . . . .	12.00
A. B. McCoy, sole trader, doing business under the trade name of McCoy Auto Co. . . . .	194.96
Marshall-Wells Co., a corporation . . . . .	610.34
J. M. Murphy and B. C. Thompson, partners, doing business under the firm name of Murphy & Thompson (assigned to Ridgefield State Bank, a corporation) . . . . .	27.70
Mitchell, Lewis & Staver Co., a corporation . . . . .	506.65
Meese & Gottfried Company, a corporation . . . . .	6.65
Nikum & Kelly Sand & Gravel Co., a corporation . . . . .	4,375.75
Northern Pacific Railway Co., a corporation (assigned to Vancouver National Bank, a corporation) . . . . .	27.00
Pacific Derrick & Hoist Co., a corporation . . . . .	55.50

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R. H. O'Niell, C. L. Peck and B. McCormack, partners, doing business under the firm name of Peck-O'Niell Lumber Co. ....	15.96
Portland Machinery Co., a corporation..	95.70
John A. Roeblings Sons Co., of California, a corporation .....	739.53
L. Clay Sparks, M. Renie Sparks and Harry W. Sparks partners, doing business under the firm name of Sparks Hardware Co. ....	218.72
L. Clay Sparks, M. Renie Sparks and Harry W. Sparks, partners, doing business under the firm name of Sparks Auto Supply Co. ....	384.23
John A. Sauerman, sole trader, doing business under the firm name of Sauerman Bros. ....	258.08
V. U. Herman, sole trader, doing business under the firm name of Salmon Creek Garage .....	211.57
Standard Oil Co., a corporation .....	4,198.05
[40]	
William Tenny .....	1,048.18
Union Bridge Co., a corporation .....	263.02
Lewis Shattuck and E. E. Sleret, partners, doing business under the firm name of Universal Auto Co. ....	66.40
United States Rubber Company, a corporation .....	96.28
Union Oil Company of California, a corporation .....	64.09



Webber Machine Works, a corporation..	345.10
The Western Sales Co., a corporation...	559.50
Winters & Brookings, a corporation.....	18.80
Harry Wolfe .....	150.00
Zimmerman-Wells-Brown Co., a corpora- tion .....	1,032.49
<hr/>	
Total .....	\$24,818.78

### XVII.

That because and by reason of the payments made by this plaintiff to laborers and for materials and supplies as set forth in paragraph XVI hereof this plaintiff became subrogated to all the rights of said laborers and material and supply men to the extent of payments made to them as aforesaid in the total sum of Seventeen thousand nine hundred forty-five and 61/100 Dollars (\$17,945.61), and that this plaintiff is entitled to be reimbursed and repaid the whole of said sum out of the said sum of Thirty-two thousand forty-six and 16/100 Dollars (\$32,046.16) reserved and retained by the State of Washington as aforesaid.

### XVIII.

That the defendant Union National Bank of Seattle claims to have some interest in or claim to the said amount so retained by the State of Washington, but this plaintiff alleges that such interest, if any, is subsequent, subject and inferior to the claims of each of the defendants mentioned in paragraph XVI hereof.

### XIX.

That the defendant, C. W. Ryan, as trustee in

bankruptcy of the Puget Sound Engineering Company, a corporation, claims to have some interest in or claim to the said amount so retained by the State of Washington, but this plaintiff alleges that such interest, if any, is subsequent, subject and inferior to the claims of each of the defendants mentioned in paragraph XVI hereof, and to the claim of this plaintiff thereto.

## XX.

That in the completion of said contract as aforesaid this plaintiff sustained a loss, the exact amount of which is not ascertainable, but which the plaintiff believes, and thereupon alleges the fact to be, will exceed the sum of Fifteen Thousand Dollars (\$15,000.), which said sum constitutes and is a lien upon the moneys retained by the State of Washington as aforesaid and such of the machinery, plant, equipment, tools, material and supplies as are now remaining in its hands and taken over by it from the Puget Sound Engineering Company under the bills of sale hereinabove mentioned and referred to in paragraph XIY hereof.

WHEREFORE plaintiff prays judgment as follows:

1st. That said defendants, and each of them, be required to be and appear before this Court and to establish such claims as they may severally have against the said Puget Sound Engineering Company, the said sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16) retained and reserved by the State of Washington as aforesaid,

and against the bond given by this plaintiff to the State of Washington as surety for said Puget Sound Engineering Company as aforesaid.

2d. That this plaintiff have a claim against the said sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16) reserved and retained by the State of Washington as aforesaid in the sum of Seventeen Thousand Nine Hundred Forty-five and 61/100 Dollars (\$17,945.61) advanced by it as hereinbefore alleged for the purpose of paying the claims of laborers and material and supply men who performed services upon said work and furnished such materials and supplies.

3d. That the Union National Bank of Seattle and C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company be adjudged by this Court to have no right, title, claim to or interest in the said [41] sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16), or any part thereof, untill all of the claims of the defendants entitled to claim the same and all the claims of this plaintiff in, to and against said fund shall have first been paid in full.

4th. That this Court adjudge and determine the amount due to this plaintiff by reason of the loss incurred by it in the completion of said contract, and that this plaintiff be adjudged and decreed to have a lien upon the moneys so retained by the State of Washington and also a lien, prior, paramount and superior to the interest of any of the defendants herein, in, upon and against all that portion of the plant, machinery, tools, equipment, material and

supplies transferred and assigned to this plaintiff under the bill of sale in this complaint hereinabove mentioned and now in the possession of the plaintiff.

5th. For costs and disbursements herein.

McCLURE & McCLURE,

Attorneys for Plaintiff.

State of Washington,

County of King,—ss.

John C. McCollister, being first duly sworn, on oath says: That he is manager of the Puget Sound Department of the United States Fidelity & Guaranty Company, a corporation, plaintiff in the above-entitled action, and makes this affidavit by way of verification of the foregoing complaint for the reason that plaintiff is a corporation and he is its manager as aforesaid; that he has read said complaint, knows the contents thereof, and believes the same to be true.

JOHN C. MCCOLLISTER.

Subscribed and sworn to before me this 11th day of March, A. D. 1921.

WALTER A. McCLURE,

Notary Public in and for the State of Washington,  
Residing at Seattle. [42]

EXHIBIT "A."

CONTRACT.

THIS AGREEMENT, made and entered into this 21st day of July, 1919, between the STATE OF WASHINGTON, acting through the State Highway Board, under and by virtue of Chapter 186 of the Laws of 1909, and Puget Sound Engineering

Company, a corporation existing under and by virtue of the laws of the State of Washington of Seattle, Washington, hereinafter called the Contractor, WITNESSETH: That in consideration of the payment, covenants and agreements, hereinafter mentioned, to be made and performed by the parties hereto, the parties hereto covenant and agree as follows:

I. The Contractor shall do all work, furnish all material for grading, draining and paving with concrete, a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), in Clarke County, Washington, Post Road Project, No. 34, between Station 257+30.6 and Station 606+60, in accordance with and as described in the attached Plans, General Stipulations and Specifications, which are hereby a part hereof, and shall have the same effect as though the same were fully inserted herein, and in full compliance with the terms, conditions and stipulations herein set forth, and shall perform any extra work which may be ordered as herein provided.

II. The Contractor shall provide and be at the expense of all materials, labor, carriage, tools, implements and conveniences and things of every description that may be requisite for the transfer of materials and for constructing and completing the work above described.

III. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direct supervision and to the complete satisfaction of the State High-



way Commissioner, subject to inspection at all times and approval by the United States Secretary of Agriculture, or his agents, and in accordance with the laws of the State of Washington and the rules and regulations of the said Secretary of Agriculture made pursuant to that certain act of Congress approved July 11, 1916 (39 U. S. Statutes at Large, 355), entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." It is also understood and agreed that such additional drawings and explanations as may be necessary to detail and illustrate the work, are to be furnished by the State Highway Commissioner, and the Contractor agrees to conform to and abide by the same, as far as may be consistent with the purpose and intent of the original drawings and specifications.

IV. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the State Highway Commissioner shall be at liberty, after three (3) days' written notice to the Contractor, to provide any such labor or materials and deduct the cost thereof from any moneys then due or thereafter become due to the Contractor under this contract; and if the State Highway Commissioner shall consider that such refusal, neglect or failure is sufficient ground for such action, he may, by written notice to the Contractor and to his Surety or its representa-

tive, terminate the employment of the Contractor for said work, and enter upon the premises and take possession of all materials, tools, and appliances thereon, for the purpose of completing the work included under this contract, and employ, by contract or otherwise, any person or persons to finish the work, and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, he shall not be entitled to receive any further balance of the amount to be paid under this contract until the work shall be fully finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the State Highway Commissioner in finishing the work, such excess shall be paid by the State to the Contractor, but if such expense shall exceed unpaid balance, the Contractor shall pay the difference to the State Treasurer.

V. The Contractor hereby agrees to commence the work called for under this agreement within ten (10) days from date hereof, and to complete all the work called for under this agreement, in all parts and requirements before the 1st day of July, 1920. The State hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder of the work, or any portion thereof, whether completed or not.

VI. Time shall be of the essence of this contract on the part of the Contractor, and in case the Contractor shall fail in the due performance of the con-

tract by and at the time herein mentioned, or by and at such other time to which the period of completion may have been extended, he shall be liable to pay to the State of Washington as and for liquidated damages, and not as penalty, the cost of engineering and inspection which shall not exceed the sum of Twenty-five (\$25.00) Dollars for each and every day which may elapse between the appointed and actual time of completion, which said sum is hereby agreed upon, fixed and determined as the damage that will be suffered by such failure to complete the work within the time named; and the State Highway Commissioner may deduct the same from the amount due or to become due to the Contractor, and such payments or deductions shall not in any degree release the Contractor from the further obligations and penalties in respect to the fulfillment of the entire contract, nor any right which the State may have to claim, sue for and recover compensation and damages for nonperformance of this contract.

VII. Payments shall be made for work and labor performed and materials furnished under this contract according to the schedule of rates and prices hereto attached and made a part hereof, and in no other manner whatsoever. The State Highway Commissioner shall determine the unit quantities and proper classification of all work done and materials furnished under the provisions of this agreement, and his determination thereof shall be final and conclusive and binding upon the Contractor.

Partial payments under this contract, not to exceed eighty per cent (80%) of the work done, shall be made at the request of the Contractor once each month, said payments to be made upon estimates of the State Highway Commissioner. Final payments for said work shall be made within thirty (30) days of the final completion and acceptance of the entire work by the State Highway Commissioner, PROVIDED, that before the making of such final payment the Contractor shall show to the satisfaction of the State Highway Commissioner that all just debts due all laborers, mechanics, material men, and persons who have supplied such Contractor, or sub-contractor, with materials or goods of any kind for this work, have been paid, and PROVIDED FURTHER, that if prior to any payment being made the State Highway Commissioner receives notice from any person or persons that any laborers, mechanics or materialmen, or other persons who have furnished or supplied said Contractor, or any sub-contractor, with any labor, service, material, goods or provisions, of any kind, in connection with the construction of said portion of the Pacific Highway that may be ordered for said portion of the Pacific Highway have claims against the Contractor, or any sub-contractor, for any such service or things, for which any such [43] laborers, mechanics, materialmen, or other persons, would be entitled to a lien under the laws of this State were said Highway not a public highway, or proper claim against the bond in such cases required by law, the State Highway Commissioner may, in his discretion, retain

out of the payments then due or to become due said Contractor, an amount, in addition to the twenty per cent (20%) above provided to be retained until the final completion of said work, sufficient to cover all such claim or claims of which notice shall have been so given, until such claim or claims shall have been fully satisfied and paid and receipts in full for the same shall have been furnished by said Contractor to the State Highway Commissioner, and the said Contractor hereby expressly agrees to pay all such claims.

VIII. Payments under this contract, to the extent of at least fifty (50%) per centum thereof, shall be made in the following manner upon presentation of proper vouchers by the Contractor, said vouchers to be approved by the State Highway Commissioner acting for the State and for Clarke County under the resolution of its Board of County Commissioners:

a. By the State Treasurer from the Motor Vehicle Fund upon warrants of the State Auditor.

b. By the State Treasurer from the Permanent Highway Fund to the credit of said County upon warrants of the State Auditor. No warrant, however, can be issued for any purpose against the Permanent Highway Fund unless there be sufficient money to pay such warrant in such fund to the credit of said county.

c. By the Treasurer of said County from the Interstate Bridge Fund of said County upon warrants of the County Auditor.

d. By the Treasurer of said County from the



Road and Bridge Fund and Road District Fund of said County upon warrants of the County Auditor.

The remaining payments under this contract, not exceeding fifty (50) per centum thereof, shall be made by the State Treasurer as the officer designated and authorized to receive and disburse the share of the United States payable under the Federal Aid Road Act on account of this project, the same having been set aside by the Secretary of the Treasury for said purpose on certificate of the Secretary of Agriculture of his approval of the plans, specifications and estimates. Payment of the share of the United States, payable under the Federal Aid Road Act on account of this project, may be made from the Public Highway Revolving Fund.

Such Federal Aid payments shall be made on warrants drawn by the Secretary of Agriculture, paid by the Secretary of the Treasury to the State Treasurer, and by him applied in reimbursement of the State fund from which advance payments have been made to the Contractor for the share of the United States, payable under the Federal Aid Road Act on account of this project, or for disbursement direct to the Contractor on presentation of proper vouchers approved by the State Highway Commissioner.

IX. Any alterations deemed necessary by the State Highway Commissioner may be made in the work shown and described in the drawings and specifications, but only upon the written order of said Highway Commissioner or his authorized representative, and when so made the value of the work so added or omitted shall be computed by the State

Highway Commissioner, and the amount so certified shall be final and conclusive, and binding upon the Contractor, and shall be added to or deducted from the contract price. The schedule of unit or itemized prices hereto attached is intended to form a part of this contract, and shall constitute as far as possible the basis upon which the value of all work added or omitted shall be computed.

X. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the State Highway Commissioner or his authorized representative. The said Contractor shall furnish the State Highway Commissioner or his authorized representative, without charge, samples of materials used in construction as said samples may be required, in order that the character of such material may be determined.

Defective work or material may be condemned by the State Highway Commissioner any time before the final acceptance of the work. Notice of such condemnation shall be given in writing by the State Highway Commissioner; such condemned work shall be immediately taken down or changed. Defective material shall be immediately removed or disposed of to the satisfaction of the State Highway Commissioner. Failure or neglect on the part of the State Highway Commissioner to condemn unsatisfactory material or reject inferior workmanship shall in no way release the Contractor, nor shall it be construed to mean the acceptance of such work, nor shall the final acceptance bar the State

of Washington from recovering damages in case fraud was practiced.

Time lost in replacing such improper work shall furnish no ground to the Contractor for claiming an extension of time for the completion of the work.

Incompetent, careless or negligent employees shall be forthwith discharged by the Contractor upon the written request of the State Highway Commissioner, or his authorized representative, and failure to comply with such request shall be sufficient grounds for the termination of the contract, as provided for in this article or Article IV hereof.

XI. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper material which may appear before the time of final payment and release.

XII. The work and material for such improvement shall be at the sole risk of the Contractor until the same shall have been fully accepted by the State Highway Commissioner, and any damage or loss that may occur or result to the same prior to the final completion and acceptance of said improvement including any extra work that may be ordered by the State Highway Commissioner, shall fall upon and be made good by the said Contractor.

XIII. The Contractor shall not let, assign, or transfer this contract, or any interest therein, or

sub-let the work herein provided to be done, or any part thereof, without the consent, in writing, of the State Highway Commissioner. The Contractor shall file with the State Highway Commissioner a duplicate of all sub-contracts made by him as aforesaid.

The Contractor shall give his personal attention to the work at all times, and shall be present, either in person or by duly authorized representative, on the site of the work continually during its progress, and shall receive instructions from the State Highway Commissioner. Any sub-contractor shall be considered the agent of the Contractor, and the latter shall be responsible for any indebtedness incurred by such agent. If any sub-contractor fails to perform his work in a satisfactory manner, his sub-contract may be terminated by the State Highway Commissioner.

XIV. The Contractor shall be liable for all damages and injury which shall be caused, or which shall occur to any person or persons or property whatsoever, by reason of any negligence of said Contractor, or any of his servants, employees, or sub-contractors, or by reason of any breach or violation of any of the provisions of this agreement, or any of his duties or obligations thereunder. The Contractor shall also assume all liabilities for and protect the State of Washington from any damages or claims arising from the use of any pretended articles or devices in any part of the work. [44]

It is mutually agreed between the parties hereto that any payments or contributions due or required by Chapter 74 of the Laws of 1911 (Industrial In-

insurance Act) from the State of Washington covered by this contract may be deducted by the State from any payment or payments made to the Contractor herein, and that the sum or sums so deducted shall be determined each month upon the basis of the work of said month, and shall be made upon the proper written order and demand of the Industrial Insurance Commission, a notice of which order and demand shall be served upon the said Contractor prior to said deduction. It is further agreed that the Contractor herein, or any sub-contractor or contractors employed by them, shall be subject to the provisions of said act as provided and required in Section 17 thereof.

XV. It is part of the public policy of the State of Washington that all work by contract or day labor done for it, or any political subdivision created by its law, shall be performed in the work days of not more than eight (8) hours each, except in case of extraordinary emergencies. No case of extraordinary emergency shall be construed to exist in any case where other labor can be found to take the place of the labor which has already been employed for eight (8) hours in any calendar day. In case of the violation of the provision of this article, the State Highway Commissioner shall have the right to cancel this contract by written notice to the Contractor and to his Surety or his representative, and shall have the right to complete the work in the manner provided in Article IV hereof.

In the employment of labor in the performance of this contract, preference shall be given, other con-



ditions being equal, to honorably discharged soldiers, sailors and marines, but no other preference or discrimination among citizens of the United States shall be made.

XVI. The Contractor agrees to execute and furnish to the State of Washington a good and sufficient bond with an approved surety company as surety, said bond to be payable to the State of Washington, and be in the penal sum of the full amount of the Contract, conditioned that he shall faithfully perform all the provisions of this contract, and further conditioned as required by law for the payment of all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work. If the State Highway Commissioner shall have reason to believe that the security on said bond has become impaired since the execution thereof, or is insufficient, he may require the Contractor to furnish other or additional security.

XVII. The State of Washington hereby promises and agrees with the Contractor to employ, and does employ him to provide the materials and to do and cause to be done the work of grading, draining, and paving with concrete a portion of the Pacific Highway between Salmon Creek and Pioneer, (Permanent Highway No. 2-B) in Clarke County, Washington, Post Road Project No. 34, between Station 257+30.6 and station 606+60. To complete and finish the same according to the drawings and specifications and the terms and conditions herein

contained and referred to, in accordance with the schedule of unit or itemized prices hereto attached and made a part hereof, and further agrees to employ him to perform any extra work that may be ordered, as provided in Section 21 of the Specifications, at the actual cost, plus ten per cent (10%), which cost shall not include overhead expense or the use of equipment, and hereby contracts to pay the sums stipulated at the time and in the manner and upon the conditions above set forth.

The Contractor for himself, and for his heirs, successors, executors, administrators and assigns, does hereby agree to the full performance of all the covenants herein contained upon his part.

XVIII. It is further provided that no liability shall attach to the State by reason of entering into this contract, except as especially provided herein.

IN WITNESS WHEREOF, the said Contractor has hereunto set his hand and seal, and the said State Highway Board of Washington has pursuant to resolutions duly adopted, caused these presents to be subscribed by its Chairman and Secretary, and the name of the Board to be hereunto affixed the day and year first above written.

PUGET SOUND ENGINEERING CO.,

W. H. BORROW, Pres.,

L. P. BANKSON, Sec.,

Contractor.

STATE HIGHWAY BOARD OF WASHINGTON,

By LOUIS F. HART, Chairman.

By JAMES ALLEN, Secretary.

GENERAL STIPULATIONS.

It will further be expressly agreed between the parties to the contract that the contract is made subject to the following conditions and stipulations:

a. It is understood that intending bidders have examined the work covered by these plans and specifications and have satisfied themselves as to the nature and intent of the work to be done; contract and specifications to be strictly enforced in order to obtain a finished and workmanlike job.

In case of ambiguity of expression in the specifications, or doubt as to the correct interpretation of the same, the matter shall be submitted to the Highway Commissioner, whose decision shall be final.

b. Any work or materials that may have been accidentally omitted in the description of the work, but which is clearly implied, shall be furnished by the contractor the same as if it had been specifically stated. Work shown on the plans and not mentioned in the specifications, and *vice versa*, will be done as if shown by both, when and where required.

c. Wherever the word "engineer" is used it refers to the Highway Commissioner, his chief engineer or authorized assistants, by whom all explanations and directions necessary for the satisfactory prosecution and completion of the work described in these specifications will be given.

d. Wherever the word "contractor" is used it refers to and means the party or parties who shall have duly entered into contract with the State of

Washington to perform the work; their duly authorized agents or legal representatives.

e. Any written notice to the contractor which may be requisite under these specifications may be served on said contractor either, personally or by mail or by leaving the same at his last known place of residence. [45]

f. All engineer's marks, monuments, or stakes shall be carefully preserved without disturbance until permission for their removal shall be given by the engineer. All expense incurred through the resetting of stakes that have been destroyed by the contractor will be charged to the contractor and deducted from his estimates.

g. No deviation from the specifications or detailed plans will be allowed, unless a written permission shall have been previously obtained from the Highway Commissioner.

h. The Highway Commissioner, during the progress of the work, may, by giving written notice to the contractors, alter any of the details of construction in any manner that may be found expedient or suitable; such alterations shall not invalidate the contract, and the contractor must accept and execute the same as if they were part of the original contract and at the completion of the work an allowance will be made for such alterations, etc., either for or against the contractor as the case may be, and the value of such alterations will be estimated by the engineer from the schedule of rates and prices attached to the contract, or

should it not apply, the equitable amount will be estimated by the engineer.

i. It is mutually agreed between the parties to the contract, that to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in these specifications, or their performance by either of said parties, the Highway Commissioner shall be an umpire to decide all matters arising or growing out of said contract between them.

j. The contractor will be held responsible for the faithful execution of the work in accordance with the specifications. Any defective work that may be discovered by the engineer or his appointees before the final acceptance, or before final payment shall have been made, shall be removed and replaced by work and materials which shall conform to the spirit of the specifications; the fact that the inspector or other person in charge may have overlooked such defective work shall not constitute an acceptance of the same.

k. All work, including shoulders, ditches and slopes, shall be neatly dressed and cleaned up on completion according to the engineer's direction, and be left in a neat and orderly condition, ready for use.

l. The successful bidder shall satisfy the Highway Commissioner before the contract is awarded to him, that he has or will promptly provide suitable and proper men and tools and machinery for each of the different kinds of work.

m. The contractor shall, for the same compensa-



tion as for other grading, grade a safe, proper and workmanlike connection with all intersecting public or private roads or driveways, according to the directions of the engineer.

n. All material and workmanship shall be of the best of its kind or class. All material which may be rejected shall at once be removed from the vicinity and replaced by material of approved quality.

o. The contractor shall give his personal attention to the faithful prosecution of the work, shall not sublet the same or any part thereof without the written consent of the Highway Commissioner. Copies of all sub-contracts must be filed with the Highway Commissioner. Contractor shall not assign, by power of attorney or otherwise, any of the moneys payable under these specifications.

p. Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by him be received and obeyed. If any person employed on the work shall appear to be incompetent, disorderly or unfaithful, he shall upon requisition of the engineer, be at once discharged and not again employed upon any part of the work.

q. The Highway Commissioner may suspend all work on any or all portion of the road for such periods as he may deem necessary. The contractor shall not make any claim or demand for damage by reason of such suspensions in the work, but the period of such suspension will be excluded in com-

puting the time limit for the completion of the work.

r. The contractor agrees to assume all risks and liabilities for accidents or damage that may accrue to persons or property during the prosecution of the work under these specifications, by reason of the negligence or carelessness of himself, his agents or employees.

s. All work will be measured and paid for as set forth in the attached form of bids.

t. No bid will be considered unless prices be given for each item in proposal blank.

u. The preliminary estimates, the plans, and the grade and alinement as staked on the ground or shown on profiles and maps, are intended to represent the work to be done with reasonable closeness, but the contract is not for any specific number of units of any kind, nor for any specific grade line or alinement.

v. Where the improvement follows an existing traveled road the contractor shall at his own expense keep the road open to traffic or provide suitable detours so that traffic will not be interrupted.

w. The bidders' attention is particularly called to sections one and two of the specifications and also to section three, Chapter 33 of the Session Laws of 1917, with reference to the burning of refuse, timber, brush and debris from clearing and grubbing operations.

The Highway Board, the Washington Forest Fire Association and the State Fire Warden all insist that the statutes covering the matter be strictly en-

forced, and that the refuse from clearing and grubbing on public roads be properly disposed of and the premises be left in a neat and presentable condition.

The provisions of the specifications and the statutes, therefore, will be strictly enforced.

x. **FEDERAL PARTICIPATION:** The attention of the bidder is invited to the fact that pursuant to the provisions of that certain Act of Congress, approved July 11, 1916 (39 Sta. 355), entitled, "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," the United States Government is to pay a portion of the cost of this improvement. The above Act of Congress provides that the construction work and labor in each state shall be done in accordance with its laws and under the direct supervision of the State Highway Department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant thereto. The construction work, therefore, will be subject to such inspection by the United States Secretary of Agriculture, or his agents, as may be necessary to meet the above requirements, but such inspection will in no sense make the Federal Government a party to this contract and will in no way interfere with the rights of either party hereunder, nor will it subject the contractor to compliance with the Federal laws relative to labor, etc., on Government contracts. [46]

## PROPOSAL.

To the State Highway Board, Olympia, Washington.

Gentlemen:

The undersigned hereby certify that they have examined the location of the Pacific Highway, Salmon Creek to Pioneer, in Clarke County, Station 257+30.6 to Station 606+60 and have read and thoroughly understand the plans, specifications and contract governing the work embraced in this improvement, and the method by which payment will be made for said work, and hereby propose to undertake and complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of rates and prices:

Common Excavation, including

haul of 400 feet..... Per Cu. Yd. .80

Subgrade Excavation, including

haul of 400 Ft..... Per Cu. Yd. .90

Overhaul on any of the above

materials per each 100 Ft. Per Cu. Yd. .04

Preparation of Subgrade..... Per Sq. Yd. .06

One Course Cement Concrete

Pavement in place..... Per Sq. Yd. 2.39½

Pavement Reinforcing in place Per Sq. Yd. .05

Pavement Header Design No.

1, in place..... Per Lin. Ft. 1.00

Pavement Header Design No.

2, in place..... Per Lin. Ft. .80

Reinforced Concrete Gutter in

place ..... Per Lin. Ft. 1.00

Tile Drain in place 6" dia..... Per Lin. Ft. .50

Guard Rail in place including

spikes and bolts..... Per Lin. Ft. 1.25

Attached hereto is certified check for Twelve Thousand Five Hundred Dollars (\$12,500.00), payable to the State Treasurer of Washington, this amount being five per cent (5%) of the total bid, based upon the approximate estimate of quantities at the above prices.

Dated at Olympia, Washington, this 14th day of July, 1919.

PUGET SOUND ENGINEERING CO.

By W. H. BORROW,

Prest.

Address of Bidder:

(Principal place of business)

611-612 Mutual Life Bldg.,

Seattle, Wn. [47]

### EXHIBIT "B."

KNOW ALL MEN BY THESE PRESENTS, that Puget Sound Engineering Company, a corporation, existing under and by virtue of the laws of the State of Washington, of Seattle, Washington, as Principal, and United States Fidelity & Guaranty Company, as surety, are jointly and severally held and bound unto the State of Washington, in the penal sum of Two Hundred Five Thousand Four Hundred Eighty-five and 31/100 Dollars (\$205,485.-31), for the payment of which we jointly and sev-



erally bind ourselves, our heirs, executors, administrators and assigns and successors and assigns, firmly by these presents.

THE CONDITION of this bond is such that, WHEREAS, on the 21st day of July, A. D. 1919, the said Puget Sound Engineering Company, Principal herein, made and entered into a certain contract with the State of Washington, by the terms, conditions and provisions of which contract the said Puget Sound Engineering Company, Principal herein, agrees to furnish all material and do certain work, to wit: That it will undertake and complete the construction of a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), in Clarke County, Washington, Post Road Project No. 34, between Station 257 plus 30.6 and Station 606 plus 60, as per maps, plans and specifications made a part of said contract;

NOW, THEREFORE, if the principal herein shall faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and shall well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein, and within the time prescribed therein, and shall indemnify the State of Washington against any direct or indirect damages that shall be suffered or claimed, for injuries to persons or property during the construction and improvement of such highway, and until the same is accepted, and shall pay all laborers,

mechanics, sub-contractors and materialmen, and all persons who shall supply such contractor or sub-contractors with provisions and supplies for the carrying on of such work, and shall in all respects faithfully perform said contract according to law, then this obligation to be void, otherwise to remain in full force and effect.

WITNESS our hands this 21st day of July, 1919.  
PUGET SOUND ENGINEERING COMPANY.

(Seal) W. H. BORROW, President,  
L. C. BANKSON, Secretary,  
Principal.

UNITED STATES FIDELITY AND  
GUARANTY CO.

(Seal) By D. H. McCOLLISTER,  
Attorney-in-fact,  
Surety.

Address of local office and agent of Surety Company: PUGET SOUND DEPT., 702-5 Hoge Bldg., Tel. Elliott 958.

JOHN C. McCOLLISTER,  
Manager.

C. H. CAMPBELL,  
Assistant Manager.

Approved as to form, July 23, 1919.

JNO. A. HOMER,  
Assistant Attorney General.

Approved as to execution by surety and statement of capital and surplus, July 22, 1919.

J. O. RUMMENS,  
Deputy Insurance Commissioner.

Approved July 28, 1919.

(Seal)

LOUIS F. HART,

Acting Governor. [48]

**Exhibit "B."**

In the Superior Court of the State of Washington  
for the County of Thurston.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner;  
C. W. CLAUSEN, as State Auditor; CLIF-  
FORD L. BABCOCK, as State Treasurer;  
C. W. RYAN, as Trustee in Bankruptcy of  
PUGET SOUND ENGINEERING COM-  
PANY, a Corporation; A. N. ALLEN, Sole  
Trader, Doing Business Under the Trade  
Name of ALLEN GARAGE; ALLEN &  
LEWIS, a Corporation; C. B. BRALEY  
and L. B. CUSICK, Partners Doing Business  
Under the Firm Name of BRALEY & CU-  
SICK; J. G. BENNETT, Sole Trader, Doing  
Business Under the Trade Name of BEN-  
NETT HARDWARE COMPANY; M.  
BARDE & SONS, INC., a Corporation; L.  
J. BROCK; CLYDE EQUIPMENT COM-  
PANY, a Corporation; J. W. CRAMER, Sole  
Trader, Doing Business Under the Trade  
Name of MAPLEWOOD DAIRY FARM;

F. T. CROWE & CO., a Corporation; COAST STEEL & MACHINERY CO., a Corporation; CONTRACTORS' MACHINERY & STORAGE CO., a Corporation; P. A. CHRISTENSON, and LLOYD A. CHRISTENSON, Partners, Doing Business Under the Firm Name of CHRISTENSON & SON; E. G. DITLEVSEN, Sole Trader, Doing Business Under the Trade Name of SANITARY MEAT MARKET; GEORGE L. DuBOIS, W. B. DuBOIS, and JOS. J. DONOVAN, Partners, Doing Business Under the Firm Name of DuBOIS MILL COMPANY; DANVILLE CO., a Corporation; CHARLES DAHL and L. PENNE, Partners, Doing Business Under the Firm Name of DAHL & PENNE; F. L. EVANS; I. N. FLEISCHNER, M. FLEISCHNER, M. A. MAYER, SAM SIMON, JOSEPHINE HIRSCH, SANFORD HIRSCH and NATHAN STRAUSS, Partners, Doing Business Under the Firm Name of FLEISCHNER, MAYER & CO.; FEENAUGHTY MACHINERY CO., a Corporation; FULLINWIDER MEAT COMPANY, a Corporation; GREELY'S FORD GARAGE, a Corporation; GREAT NORTHERN RAILWAY CO., a Corporation; GEORGE GODDARD, [49] ELIZABETH GODDARD, W. FOSTER HIDDEN and OLIVER M. HIDDEN, Partners, Doing Business Under the Firm Name of HIDDEN BROS.; HONEY-

MAN HARDWARE CO., a Corporation;  
H. E. JOHNSON; J. P. LEE; A. B. Mc  
COY, Sole Trader, Doing Business Under  
the Trade Name of McCOY AUTO CO.;  
MARSHALL-WELLS COMPANY, a Cor-  
poration; J. M. MURPHY and B. C.  
THOMPSON, Partners, Doing Business  
Under the Firm Name of MURPHY &  
THOMPSON; MITCHELL, LEWIS & STA-  
VER, a Corporation; MEESE & GOTT-  
FRIED COMPANY, a Corporation;  
NIKUM & KELLY SAND & GRAVEL  
CO., a Corporation; NORTHERN PACIFIC  
RAILWAY CO., a Corporation; PACIFIC  
DERRICK & HOIST CO., a Corpora-  
tion; R. H. O'NIELL, C. L. PECK and  
B. McCORMACK, Partners, Doing Business  
Under the Firm Name of PECK-O'NIELL  
LUMBER CO.; PORTLAND MACHIN-  
ERY CO., a Corporation; RIDGEFIELD  
STATE BANK, a Corporation; JOHN A.  
ROEBLING SONS CO. of California, a Cor-  
poration; L. CLAY SPARKS, M. RENIE  
SPARKS and HARRY W. SPARKS, Part-  
ners, Doing Business Under the Firm Name  
of SPARKS HARDWARE CO.; L. CLAY  
SPARKS, M. RENIE SPARKS and  
HARRY W. SPARKS, Partners, Doing  
Business Under the Firm Name of SPARKS  
AUTO SUPPLY CO.; JOHN A. SAUER-  
MAN, Sole Trader, Doing Business Under  
the Firm Name of SAUERMAN BROS.; V.  
U. HERMAN, Sole Trader, Doing Business



Under the Firm Name of SALMON CREEK GARAGE; STANDARD OIL CO., a Corporation; WILLIAM TENNY; UNION BRIDGE CO., a Corporation; LEWIS SHATTUCK and E. E. SLERET, Partners, Doing Business Under the Firm Name of UNIVERSAL AUTO CO.; UNITED STATES RUBBER COMPANY, a Corporation; UNION NATIONAL BANK OF SEATTLE, a Corporation; UNION OIL COMPANY OF CALIFORNIA, a Corporation; VANCOUVER NATIONAL BANK, a Corporation; WEBBER MACHINE WORKS, a Corporation; THE WESTERN SALES CO., INC., a Corporation; WINTERS & BROOKINGS, a Corporation; HARRY WOLFE; ZIMMERMAN-WELLS-BROWN CO., a Corporation,  
Defendants.

**ANSWER OF C. W. RYAN, AS TRUSTEE IN  
BANKRUPTCY OF PUGET SOUND ENGI-  
NEERING COMPANY, A CORPORATION.**

Comes now defendant, C. W. Ryan, as trustee in bankruptcy, of Puget Sound Engineering Company, a corporation, and in answer to the complaint filed in the above-entitled court and cause by plaintiff, United States Fidelity & Guaranty Company, a corporation, admits, denies and alleges as follows:

**I.**

Admits allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XVIII of said complaint.

II.

Has not sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations of Paragraphs XII, XV and XVI of said complaint, and therefore denies each, all and every of the allegations of said paragraphs.

III.

Denies each, all and every of the allegations of Paragraphs XVII and XX of said complaint.

IV.

Admits the following allegations of Paragraph XIII of said complaint: That plaintiff, upon investigation, discovered that [50] said Puget Sound Engineering Company was in default in payment of claims of laborers for work and labor performed upon said contract and in payment of claims for materials and supplies, but has not sufficient information or knowledge on which to form a belief as to the other allegations of said Paragraph XIII, and, therefore, denies each, all and every of the other allegations of said paragraph.

V.

Denies the allegations of Paragraph XIV of said complaint, except as is hereinafter admitted or qualified in the separate answer and cross-complaint of defendant.

VI.

Admits the following allegations of Paragraph XIX of said complaint: That the defendant C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, claims to have some interest in or claim to the amount retained

by the State of Washington, but denies each, all and every other allegation of said Paragraph XIX.

And for a further and separate answer and defense, counterclaim and cross-complaint to the complaint filed herein by plaintiff, defendant alleges and says:

### I.

That at all the times herein mentioned plaintiff was and now is a corporation, organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company.

### II.

That at all the times herein mentioned the Puget Sound Engineering Company was and now is a corporation, organized and existing under the laws of the State of Washington, with its principal [51] office at Seattle, King County, in said state, and that on the 16th day of December, 1920, it was duly adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in Cause Number 6460 on the records of said court, upon an involuntary petition filed in said court and cause on the 22d day of November, 1920, and that said bankruptcy cause was on the 16th day of December, 1920, referred by said United States District Court to the Honorable C. R. Hawkins, Referee at Seattle, for further proceedings and

administration, as provided by law; that on the first day of February, 1921, at the first meeting of creditors of said bankrupt corporation, held after due notice, before said referee in bankruptcy, the defendant herein, C. W. Ryan, was duly appointed trustee in bankruptcy of said bankrupt estate, and thereupon duly qualified as such trustee by filing the requisite bond, which bond has been duly accepted and approved, and that said C. W. Ryan is the duly elected, regularly qualified and acting trustee of said bankrupt.

### III.

That by virtue of the provisions of the acts of Congress relating to bankruptcy, defendant, as trustee in bankruptcy of said Puget Sound Engineering Company, became vested with the title to all the property of said bankrupt of whatsoever kind or character, nature and description as of the date of the filing of said petition in bankruptcy, and said defendant also became entitled to all the right of action which the said creditors of said bankrupt had at the time of said filing of said petition to avoid all transfers made by said Puget Sound Engineering Company and to recover said property so transferred or its value, and said defendant, as trustee, became further entitled to recover property, or its value, transferred by said Puget Sound Engineering Company in fraud of its creditors as well as all property, [52] or its value, transferred by said Puget Sound Engineering Company within four months prior to the filing of said petition in bankruptcy if the effect of such transfer

was to enable the transferees to obtain a greater percentage of its or their claim than any other creditors of the same class, and the person or persons receiving same or to be benefited thereby, or their agents acting therein, shall have had reasonable cause to believe that said transfer or transfers would effect a preference under said Bankruptcy Act.

#### IV.

That on the 25th day of September, 1920, and for a long time prior thereto, the said Puget Sound Engineering Company was insolvent.

#### V.

That while insolvent, to wit, on the 25th day of September, 1920, the said Puget Sound Engineering Company, made, executed and delivered to the said plaintiff, United States Fidelity & Guaranty Company, two certain instruments intended to effect a transfer, and the effect of which did transfer the property therein particularly mentioned and described, a copy of which instruments are hereto annexed, marked Exhibit "A" and Exhibit "B," and prayed to be read as a part hereof, as completely and as fully as though here and now set forth in full.

#### VI.

That said property mentioned in said instruments of transfer was taken possession of by said plaintiff herein on or about the said 25th day of September, 1920, and other property of said Puget Sound Engineering Company, not mentioned and described in said bills of sale, was then also taken



possession of by said plaintiff, the exact description, quality, kind and character of which is not in the information and knowledge of the defendant herein, except that among said property not mentioned in said bills of sale was a quantity of cement, lumber, expansion joints and other material, the value of [53] which likewise is not in the information or knowledge of the defendant, but which defendant believes and therefore alleges was and is in excess of Twenty Thousand and No/100 (\$20,000.00) Dollars, nor has the defendant sufficient information or knowledge concerning the value of the property mentioned, described and set forth in the bills of sale referred to herein and attached hereto, which property was taken possession of by the said plaintiff, as heretofore set forth, but defendant believes, and therefore alleges, that the value of said property so taken possession of and so described in said bills of sale was and is in excess of Twenty Thousand and No/100 (\$20,000.00) Dollars.

## VII.

That said property transferred and delivered to said plaintiff herein on the 25th day of September, 1920, by said Puget Sound Engineering Company was transferred for the purpose of securing and indemnifying the said plaintiff against the liability and obligation of its suretyship upon a certain bond executed by the Puget Sound Engineering Company as principal and the said United States Fidelity & Guaranty Company, plaintiff, as surety, on the 21st day of July, 1919, payable to the State of

Washington in the penal sum of Two Hundred Five Thousand Four Hundred Eighty-five and 31/100 (\$205,485.31) Dollars, said bond being set forth as Exhibit "B," attached to plaintiff's complaint, reference to which is here and now made, and which is prayed to be read as a part hereof as fully as though the same were now and here set forth in full.

### VIII.

That the liability and obligation of said plaintiff as surety upon said bond, referred to in the preceding paragraph, had already been incurred and the transfers to said plaintiff by said Puget Sound Engineering Company were in payment of or as security for the payment of an antecedent obligation, and not for a present consideration, and that said transfers of said property mentioned herein, as aforesaid, were made within four months of the filing of the petition in bankruptcy against said Puget Sound Engineering Company. [54]

### IX.

That the said plaintiff, United States Fidelity & Guaranty Company, knew or had reasonable cause to believe that at the time of said transfers, to wit, on September 25, 1920, the said Puget Sound Engineering Company was insolvent, and said plaintiff knew or had reasonable cause to believe that the making, executing and delivery of said instruments of transfer and the transfer of said property, as aforesaid, would in effect enable the said plaintiff to receive a greater percentage of its debt than any other creditor or creditors of the said Puget

Sound Engineering Company of the same class, and that the said execution and delivery of said instruments and the said transfer of said property did enable the said defendants to receive a greater percentage of their debt than any other creditors of the same class and that by reason of the premises aforesaid, the said instruments of transfer and the said transfer of said property did effect a preference as aforesaid, and that the said transfer is therefore void as against this defendant.

## X.

That on the 9th day of February, 1921, and on the 23d day of April, 1921, and at other times between said dates, the said defendant C. W. Ryan, as trustee in bankruptcy of said Puget Sound Engineering Company demanded from plaintiff the property set forth in paragraphs V and VI hereof, but the said plaintiff refused to return or turn over said property and still doth refuse.

## XI.

That the assets of said estate in bankruptcy are insufficient to pay creditors in full.

## XII.

That on the — day of April, 1921, an order was duly made and entered by the referee in bankruptcy to whom the bankruptcy cause of said Puget Sound Engineering Company had been referred, directing the trustee herein to file this answer, counterclaim and cross-complaint. [55]

And for a second and further separate answer and defense, counterclaim and cross-complaint, defendant alleges and says:

## I.

That at all the times herein mentioned plaintiff was and now is a corporation, organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company.

## II.

That at all the times herein mentioned the Puget Sound Engineering Company was and now is a corporation, organized and existing under the laws of the State of Washington, with its principal office at Seattle, King County, in said state, and that on the 16th day of December, 1920, it was duly adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in Cause Number 6460 on the records of said court, upon an involuntary petition filed in said court and cause on the 22d day of November, 1920, and that said bankruptcy cause was on the 16th day of December, 1920, referred by said United States District Court to the Honorable C. R. Hawkins, Referee at Seattle for further proceedings and administration, as provided by laws; that on the first day of February, 1921, at the first meeting of creditors of said bankrupt corporation, held after due notice, before said referee in bankruptcy, the defendant herein, C. W. Ryan, was duly appointed trustee in bankruptcy of said bankrupt estate, and

thereupon duly qualified as such trustee by filing the requisite bond, which bond has been duly accepted and approved, and that said C. W. Ryan is the duly elected, regularly qualified and acting trustee of said bankrupt. [56]

### III.

That by virtue of the provisions of the Acts of Congress relating to bankruptcy, defendant, as trustee in bankruptcy of said Puget Sound Engineering Company, became vested with the title to all the property of said bankrupt of whatsoever kind or character, nature and description as of the date of the filing of said petition in bankruptcy, the said defendant also became entitled to all the rights of action which the said creditors of said bankrupt had at the time of said filing of said petition to avoid all transfers made by said Puget Sound Engineering Company and to recover said property so transferred or its value, the said defendant, as trustee, became further entitled to recover property, or its value, transferred by said Puget Sound Engineering Company in fraud of its creditors.

### IV.

That amongst the property owned by the bankrupt at the date of the filing of the petition in bankruptcy against it was the right to receive certain moneys due it, but which were held and retained by the State of Washington by virtue of the terms of a compact entered into between the said Puget Sound Engineering Company and the State of Washington, through the State Highway Board



on or about the 21st day of July, 1919, referred to in Paragraph VII of plaintiff's complaint, which defendant is informed, and therefore alleges, amounted to the sum of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) Dollars.

V.

That the assets of said estate in bankruptcy are insufficient to pay creditors in full.

VI.

That by virtue of the Acts of Congress relating to bankruptcy, your defendant is entitled to said moneys retained by the State of Washington, as aforesaid. [57]

VII.

That on the — day of April, 1921, an order was duly made and entered by the referee in bankruptcy to whom the bankruptcy cause of said Puget Sound Engineering Company had been referred, directing the trustee herein to file this answer, counterclaim and cross-complaint.

WHEREFORE, defendant, C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, prays that a decree may be entered by this Court:

1. That the transfer by the Puget Sound Engineering Company of the plant, equipment and materials as alleged and set forth herein, be declared null, void, invalid and of no effect.

2. That an accounting be required of the plaintiff herein for the purpose of determining the value of the property received by it from the said Puget Sound Engineering Company, as herein alleged.

3. That upon said account being had that a judgment be awarded the defendant as against plaintiff in the amount of the value of said property transferred to it, as aforesaid, as ascertained by said accounting.

4. That defendant be determined to be entitled to moneys retained by the State of Washington, as herein set forth, in the amount of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) Dollars.

5. That defendant have his costs and expenses in this behalf expended.

6. Such other and further relief as to this Court may seem fit and proper.

SIDNEY TEISER,

McMASTER, HALL & SCHAFFER,

Attorneys for Defendant, C. W. Ryan, Trustee in  
Bankruptcy of Puget Sound Engineering Com-  
pany, a Corporation, Bankrupt. [58]

State of Washington,  
County of Clarke,—ss.

I, C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, being first duly sworn, depose and say, that I am one of the defendants in the above-entitled action and that the facts contained in the foregoing answer are true as I verily believe.

C. W. RYAN.

Subscribed and sworn to before me this — day  
of April, 1921.

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Notary Public in and for the State of Washington,  
Residing at Vancouver. [59]

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**Exhibit "C."**

In the Superior Court of the State of Washington,  
in and for the County of Thurston.

No. 7874.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner,  
et al.,

Defendants.

PLAINTIFF'S REPLY TO ANSWER OF C. W.  
RYAN AS TRUSTEE IN BANKRUPTCY.

The United States Fidelity & Guaranty Company, a corporation, plaintiff above named, replying to the answer of the defendant C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, verified May 5, 1921.

I.

Has no knowledge and therefore denies, each allegation of paragraph IV of said defendant's further and separate answer and defense, counterclaim and cross-complaint.

## II.

Denies each allegation of paragraph V of said further and separate answer and defense, counterclaim and cross-complaint except that plaintiff admits that said instruments were executed and delivered September 25, 1920.

## III.

Denies each allegation of paragraph VI of said further and separate answer and defense, counterclaim and cross-complaint except that plaintiff admits that September 25, 1920, the plaintiff entered upon and took possession of all the work under the highway contract of the Puget Sound Engineering Company mentioned in the complaint, and entered upon and took possession of the personal property of said Puget Sound Engineering Company located upon said highway as alleged [60] in the complaint, and denies that the value of said property then was, or now is, Twenty Thousand Dollars (\$20,000.00), or any other or greater sum than Forty-five Hundred Dollars (\$4500.00).

## IV.

Denies each allegation of paragraph VII of said further and separate answer and defense, counterclaim and cross-complaint except as the matters therein referred to are set forth in the complaint herein, the allegations of which complaint are true.

## V.

Denies each allegation of paragraph VIII of said further and separate answer and defense, counterclaim and cross-complaint except as said matters

appear in the complaint herein, the allegations of which complaint are true.

VI.

Denies each allegation of paragraphs IX and X of said further and separate answer and defense, counterclaim and cross-complaint.

VII.

Denies each allegation of paragraph IV of said defendant's second and further separate answer and defense, counterclaim and cross-complaint, and denies that the said Puget Sound Engineering Company owned at the date of the filing of said petition in bankruptcy, or had any interest in said sum of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) or any other sum except as set forth in the complaint herein.

VIII.

Denies each allegation of paragraph VI of said second and further separate answer and defense, counterclaim and cross-complaint.

WHEREFORE plaintiff demands judgment as in the complaint herein.

McCLURE & McCLURE,  
Attorneys for Plaintiff. [61]

State of Washington,  
County of King,—ss.

John C. McCollister, being first duly sworn, on oath says: That he is manager of the Puget Sound department of the United States Fidelity & Guaranty Company, a corporation, plaintiff in the above-entitled action, and makes this affidavit by way of



verification of the foregoing reply for the reason that plaintiff is a corporation and he is its manager as aforesaid; that he has read said reply, knows the contents thereof, and believes the same to be true.

JOHN C. McCOLLISTER.

Subscribed and sworn to before me this 16th day of May, A. D. 1921.

W. S. OSBORN,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [62]

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**Exhibit "D."**

In the Superior Court of the State of Washington  
in and for the County of Thurston.

No. 7974.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner,  
C. W. CLAUSEN, as State Auditor, CLIF-  
FORD L. BABCOCK, as State Treasurer,  
C. W. RYAN, as Trustee in Bankruptcy of  
Puget Sound Engineering Company, a Corpo-  
ration, et al.,

Defendants.

NOTICE OF APPEAL.

To the Above-named Plaintiff and to McClure & McClure, Its Attorneys:

Please take notice that C. W. Ryan, as Trustee in bankruptcy for the Puget Sound Engineering Company, a corporation, one of the above-named defendants, hereby appeals from the judgment of the Superior Court of Thurston County, made and entered herein on the 21st day of November, 1921, in the above-entitled cause, as to paragraphs V and VI of said judgment, and from each and every part of said judgment and the whole thereof in so far as the same fails to give judgment in favor of this appealing defendant and against the plaintiff for the value of the equipment, material and supplies turned over by the Puget Sound Engineering Company to the plaintiff, as alleged in this defendant's answer and in accordance with the additional findings of fact proposed by this defendant herein.

Dated this 10th day of February, 1922.

SIDNEY TEISER,

McMASTER, HALL & SCHAEFER,

Attorneys for the Defendant, C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, Bankrupt. [63]

Received copy of foregoing August 29, 1923.

McCLURE & McCLURE,

Attys. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

138 *United States Fidelity & Guaranty Company*  
Division. Aug. 30, 1923. F. M. Harshberger,  
Clerk. By P. A. Page, Deputy. [64]

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In the United States District Court for the Western  
District of Washington, Northern Division.

No. 6460.

In the Matter of the PUGET SOUND EN-  
GINEERING COMPANY, a Corporation,  
Bankrupt.

**Order upon Claim and Petition of the United States  
Fidelity & Guaranty Co.**

The United States Fidelity & Guaranty Company, as Claimant and Petitioner, having heretofore, to wit, on August 22, 1923, filed herein its claim and petition wherein it prayed for certain relief therein mentioned, and upon which said claim and petition and order to show cause herein was issued directed to C. W. Ryan as trustee in bankruptcy of said bankrupt and restraining said C. W. Ryan as trustee from doing certain acts and things as is in said order to show cause specified.

And now, on this 30th day of August, 1923, the matter of said petition and the answer of the said C. W. Ryan as trustee thereto having come regularly on for hearing, the claimant and petitioner appearing by McClure & McClure, its attorneys, and C. W. Ryan as trustee appearing by Sidney Teiser his attorney, and the Court having heard and considered the parties respectively, being fully advised, it is by the Court ordered:

## I.

That the petition of the United States Fidelity & Guaranty Company to set off its said claim against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in Bankruptcy and against said [65] United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000) Dollars and costs be, and the same is, hereby denied; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

## II.

That the restraining order issued herein against the said C. W. Ryan as trustee be, and the same is, hereby dissolved; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

## III.

That said C. W. Ryan, Trustee, be and he hereby is, directed to refrain from issuing execution upon said judgment of Twenty-two Thousand Dollars (\$22,000) and costs, rendered by the Superior Court of the State of Washington, for the County of Thurston, for a period of twenty days. This by the consent of counsel for trustee.

## IV.

It is further ordered that the claim filed herein by said United States Fidelity & Guaranty Company on August 22, 1923, considered as a general claim, be referred to C. R. Hawkins, Referee in Bankruptcy at Seattle in said District, for further

proceedings as provided by law in the due administration of said estate in bankruptcy; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

Done in open court this 30th day of August, A. D., 1923.

FRANK S. DIETRICH,

Judge. [66]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 30, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [67]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Petitioner.

**Petition for Appeal.**

To the Honorable Judges of the Above-entitled Court.

The United States Fidelity & Guaranty Company, a corporation, petitioner above named, feeling itself aggrieved by the order and decree made and



entered by the above-entitled court in the above-entitled cause, under date of August 30, 1923, wherein and whereby, among other things, it was and is ordered and decreed that the petition of the United States Fidelity & Guaranty Company to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-Two Thousand (\$22,000) Dollars and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered [68] as a general claim, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree, and particularly from the part thereof above specified, for the reasons set forth in the assignment of errors which is filed herewith, and the said petitioner prays that this, its petition for the said appeal may be allowed; that citation issue to the duly appointed and acting trustee of the estate of said bankrupt; and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of Septemer, 1923.

CHADWICK, McMICKEN, RAMSEY &  
RUPP and

McCLURE & McCLURE,

Solicitors for Petitioner.

The foregoing claim of appeal is allowed this 8th day of September, 1923.

JEREMIAH NETERER,  
United States District Judge Presiding in the  
Above-named District.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [69]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Assignment of Errors.**

Comes now the petitioner, United States Fidelity & Guaranty Company, a corporation, and files the following assignment of errors, upon which it will rely on its appeal from the order and decree made

and entered by this Honorable Court on the 30th day of August, 1923, in the above-entitled matter:

I.

The United States District Court in and for the Western District of Washington, Honorable Frank C. Dietrich presiding, erred in adjudging and decreeing that the petition of the said United States Fidelity & Guaranty Company, a corporation, to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in Bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000) Dollars and costs, be denied.

II.

The said Court erred in adjudging and decreeing that [70] the restraining order heretofore issued herein against said C. W. Ryan as trustee in bankruptcy, on petitioner's said petition, be dissolved.

III.

The said Court erred in adjudging and decreeing that said claim filed herein by said United States Fidelity & Guaranty Company, a corporation, be considered as a general claim.

WHEREFORE, the petitioner prays that the said order and decree of said Court be reversed, and the

said Court be directed to enter a decree as prayed for in said petition, verified August 22, 1923.

CHADWICK, McMICKEN, RAMSEY &  
RUPP and

McCLURE & McCLURE,  
Solicitors for the United States Fidelity & Guaranty  
Company, a Corporation.

[Endorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division. Sep. 8, 1923. F. M. Harshberger, Clerk.  
By P. A. Page, Deputy. [71]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND EN-  
GINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Order Fixing Amount of Cost Bond.**

This cause coming on for hearing upon the appli-  
cation of the petitioner, United States Fidelity &  
Guaranty Company, a corporation, to have the Court  
fix the amount of the cost bond, and the Court being  
duly advised in the premises;

IT IS HEREBY ORDERED AND DECREED that the amount of the cost bond of the said petitioner on appeal be and it is hereby fixed at the sum of Five Hundred (\$500.00) Dollars.

Done in open court this 8th day of September, 1923.

JEREMIAH NETERER,  
United States District Judge, Presiding in Above-named Court.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [72]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,

Bankrupt.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Petitioner.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that the United States Fidelity & Guaranty Company, a corporation, as principal, and American Surety Company, of New York, a corporation, duly



incorporated under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington as surety are held and firmly bound unto C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, and his successors, in the sum of Five Hundred Dollars (\$500.00) for the payment of which sum well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of September, A. D. 1923.

The condition of this obligation is such that:

WHEREAS, in the above-entitled court and proceeding an order and decree was entered on the 30th day of August, 1923, wherein and whereby it was ordered and decreed, among other things, that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered [73] in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against the United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000.00) Dollars and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim; and that the said United States Fi-

delity & Guaranty Company having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said order and decree, and a citation directed to the said C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, is about to be issued, citing and admonishing him to be and appear in United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity & Guaranty Company, a corporation, shall prosecute its said appeal to effect, and answer all costs that may be awarded against it if it fail to make said appeal good, then the above obligation is to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY.

[Corporate Seal] By C. H. CAMPBELL,  
Associate Manager of its Puget Sound Department  
Hereunto Duly Authorized.

AMERICAN SURETY COMPANY OF  
NEW YORK, a Corporation.

By S. H. MELROSE,  
Resident Vice-president.

\* [Corporate Seal] Attest: J. L. JOLLY,  
Resident Assistant Secretary.

Approved:

NETERER,  
Judge. [74]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [75]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Admission of Service of Petition of United States  
Fidelity & Guaranty Company for Appeal, etc.**

The undersigned hereby admits service and receipt of copies of the petition of the United States Fidelity & Guaranty Company, a corporation, for appeal, order allowing said appeal, said petitioner's assignment of errors, order fixing amount of cost,

bond, and said cost bond and citation on appeal this 19th day of September, 1923.

SIDNEY TEISER,

Of Solicitors for C. W. Ryan as Trustee in Bankruptcy of the Puget Sound Engineering Company, a Corporation, Bankrupt.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [76]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Order Fixing Amount of Supersedeas Bond.**

This cause comes on this day for hearing on the petition of the United States Fidelity & Guaranty Company, for an order fixing the amount of security which said petitioner shall give and furnish as a supersedeas on its appeal from the order and decree entered herein August 30, 1923, to the Circuit Court of Appeals for the Ninth Circuit, the

petitioner appearing by Chadwick, McMicken, Ramsey & Rupp and McClure & McClure, its attorneys and C. W. Ryan as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, the above bankrupt appearing by Sidney Teiser, and McMaster, Hall & Schaefer, his attorneys,

IT IS ORDERED:

1. That the amount of the security on appeal herein to be furnished by the said United States Fidelity & Guaranty Company as a supersedeas be and the same is hereby fixed at the sum of Twenty-five Thousand (\$25,000.00) Dollars.

2. That upon the making and filing with the clerk of this court of a good and sufficient bond in said sum by the said United States Fidelity & Guaranty Company, a corporation, with surety to be approved by the Court, all further proceedings in this court upon the petition of the said United States Fidelity & Guaranty [77] Company, a corporation, verified August 22, 1923, and in the Superior Court of the State of Washington for Thurston County in cause No. 7974 on the records of said court, including execution on the decree entered in said Superior Court, be superseded and stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit and until the further order of this court.



Done in open court this 20th day of September, 1923.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [78]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,  
Petitioner.

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS, that we, United States Fidelity & Guaranty Company, a corporation, as principal and the Fidelity & Deposit Company of Maryland, a corporation, duly incorporated under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Com-

pany, a corporation, bankrupt, and his successors, in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00) for the payment of which sum well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 20th day of September, A. D. 1923.

The condition of this obligation is such that:

WHEREAS, the above-named United States Fidelity & Guaranty Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and decree entered in the above-entitled court and cause, August 30, 1923, wherein and whereby it was ordered and decreed among other things that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claims, as set [79] out and proved in said petitioner's claim and petition, verified August 23, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim; and the said United States Fidelity & Guaranty Company having ob-

tained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree, and a citation directed to the said C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California; and the said United States Fidelity & Guaranty Company, having obtained an order fixing the amount of security which said petitioner shall give and furnish as a supersedeas upon said appeal, said order further providing that upon the making and filing with the clerk of this court of a good and sufficient bond in said sum to be approved by the Court, all further proceedings in this court upon the petition of said United States Fidelity & Guaranty Company, a corporation, verified August 22, 1923, and in the Superior Court of the State of Washington for Thurston County in cause No. 7974 on the records of said court, including execution on the decree entered in said Superior Court, be superseded and stayed until the final determination of said appeal by the United States Circuit Court of Appeals for [80] the Ninth Circuit and until the further order of this court.

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity & Guaranty Company, a corporation, shall prosecute its said appeal to effect, and answer all damage and costs for failure to make said appeal

good, and pay said judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against the said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs in case said order and decree appealed from shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY.

[Seal] By JOHN C. McCOLLISTER,  
Associate manager of its Puget Sound Department,  
Hereunto Duly Authorized.

FIDELITY & DEPOSIT COMPANY, OF  
MARYLAND, a Corporation.

[Seal] By J. A. CATHCART,  
Its Atty. in Fact.

The foregoing bond approved this 20th day of  
September, 1923.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Filed in the United States Dis-  
trict Court, Western District of Washington,  
Northern Division. Sep. 20, 1923. F. M. Harsh-  
berger, Clerk. By P. A. Page, Deputy. [81]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Order Extending Time to and Including November  
1, 1923, to File Record and Docket Cause.**

Upon motion of the United States Fidelity & Guaranty Company, as petitioner and appellant, by its attorneys that an order be made and entered herein extending until November 1, 1923, the time within which said petitioner and appellant shall file in the Circuit Court of Appeals for the Ninth Circuit, the record in the matter of its appeal from the order entered herein on August 30, 1923, and upon reading the affidavit of Henry F. McClure in behalf of said petitioner and appellant, it appearing to the Court on the records and files herein that good cause is shown for the granting of said order, the Court being fully advised,

IT IS ORDERED that the United States Fidelity & Guaranty Company be, and it is hereby, granted until November 1, 1923, to file in the Circuit Court of Appeals for the Ninth Circuit the record in the



matter of the appeal of said United States Fidelity & Guaranty Company from the order entered herein August 30, 1923, wherein and whereby it was ordered and decreed among other things that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claim, as set out and proved in said [82] petitioner's claim and petition, verified August 23, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of \$22,000.00 and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim.

Dated at Seattle, in said district, this 6th day of October, A. D. 1923.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [83]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Stipulation Re Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED  
by and between C. W. Ryan as trustee in bankruptcy  
of the estate of said Puget Sound Engineering Com-  
pany, a corporation, bankrupt, and the United  
States Fidelity & Guaranty Company, a corporation,  
that the clerk of the above-entitled court in preparing  
and certifying to the United States Circuit Court  
of Appeals for the Ninth Circuit the record herein  
on the appeal of said United States Fidelity & Guar-  
anty Company, a corporation, shall include therein  
transcript of the following papers and proceedings  
and none other, which papers and proceedings con-  
tain a full and complete record in said cause of all  
that is necessary to the determination of the mat-  
ters involved in said appeal, and that the same shall  
be so certified by the clerk of said court:

1. Claim and petition of the United States Fi-  
delity & Guaranty Company, filed August 22, 1923.

158 *United States Fidelity & Guaranty Company*

2. Order to show cause on said claim and petition, filed August 22, 1923.

3. Affidavit of trustee in answer to said petition, filed August 30, 1923, with exhibits annexed thereto.

4. Order upon said petition, filed August 30, 1923.

5. Petition for appeal and allowance of same, filed September 8, 1923.

6. Assignment of errors, filed September 8, 1923.

7. Order fixing amount of cost bond, filed September 8, 1923. [84]

8. Cost bond on appeal, filed September 8, 1923.

9. Citation on appeal, original, filed September 8, 1923.

10. Admission of service filed September 20, 1923.

11. Order fixing amount of supersedeas bond, filed September 20, 1923.

12. Supersedeas bond, filed September 20, 1923.

13. Order extending time to file record, filed October 6, 1923.

14. This stipulation.

IT IS FURTHER STIPULATED AND AGREED that the facts set forth in the affidavit of the Trustee in answer to the petition of the United States Fidelity & Guaranty Company which affidavit is denominated, "Affidavit in compliance with order to show cause" are true, and that the exhibits attached to the same were duly filed in the cause of the United States Fidelity & Guaranty Company, a corporation, plaintiff, vs. C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering

Company, a corporation, bankrupt, et al., defendants, and instituted in the Superior Court of the State of Washington for the County of Thurston, and that such admission was made by the United States Fidelity & Guaranty Company, petitioner, in open court at the hearing in the District Court of the United States for the Western District of Washington, Northern Division, upon the claim and petition of the United States Fidelity & Guaranty Company filed August 22, 1923, prior to the entry of the order of August 30, 1923.

Dated October 8, 1923.

CHADWICK, McMICKEN, RAMSEY &  
RUPP and

McCLURE & McCLURE,

Attorneys for United States Fidelity & Guaranty  
Company, Petitioner. .

SIDNEY TEISER,

Of Attorneys for C. W. Ryan as Trustee in Bank-  
ruptcy, as Aforesaid. [85]

[Endorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division. Oct. 13, 1923. F. M. Harshberger, Clerk.  
By P. A. Page, Deputy. [86]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 6460.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,

Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Appellant,

vs.

C. W. RYAN, as Trustee of Puget Sound Engineer-  
ing Company, a Corporation, Bankrupt,

Appellee.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 86, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal



herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges [87] incurred, and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return	272
folios at 15c.....	\$40.80
Certificate of Clerk to transcript of Record,	
4 folios at 15c.....	.60
Seal to said certificate.....	.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$41.60, has been paid to me by attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 23d day of October, 1923.

[Seal] F. M. HARSHBERGER,  
Clerk United States District Court, Western District of Washington. [88]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND EN-  
GINEERING COMPANY, a Corporation,  
Bankrupt.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States to C. W. Ryan,  
as Trustee in Bankruptcy of Puget Sound En-  
gineering Company, a Corporation, Bankrupt,  
GREETING:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held at the city of  
San Francisco in the State of California, within  
thirty days from the date of this writ, pursuant to  
an appeal filed in the clerk's office of the District  
Court of the United States for the Western District  
of Washington, Northern Division, wherein United  
States Fidelity & Guaranty Company, a corporation,  
is appellant, and you, the said C. W. Ryan, trustee  
in bankruptcy of Puget Sound Engineering Com-  
pany, a corporation, bankrupt, are appellee, to show  
cause, if any there be why the decree in the said ap-

peal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of said District Court, this 8th day of September, 1923.

[Seal]

JEREMIAH NETERER,  
Judge.

Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [89]

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[Endorsed]: No. 4123. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Puget Sound Engineering Company, a Corporation. United States Fidelity & Guaranty Company, a Corporation, Appellant, vs. C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 29, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 4123.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner.

vs.

C. W. RYAN as Trustee in Bankruptcy of the Es-  
tate of PUGET SOUND ENGINEERING  
COMPANY, a Corporation,  
Respondent.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

**Stipulation Re Record on Review.**

It is hereby stipulated and agreed by and between C. W. Ryan, as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, respondent above-named, and the United States Fidelity & Guaranty Company, a corporation, petitioner above-named, that the record on appeal of said petitioner from the order and decree made and entered by the United States District Court for the Western District of Washington, Northern Division, under date of August 30, 1923, as more particularly appears in and by the stipulation of the parties hereto made October 8, 1923, shall constitute and be the record on review herein, to the same extent and with the same effect as if the papers and

proceedings mentioned in said stipulation of October 8, 1923, were duly certified by the Clerk of said District Court and transmitted to this Court for filing in this cause.

Dated October 19, A. D. 1923.

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SIDNEY TEISER,

Of Attorneys for C. W. Ryan, as Trustee in Bankruptcy of the Estate of the Puget Sound Engineering Company, a Corporation, Respondent, 740-748 Morgan Bldg., Portland, Oregon.

CHADWICK, McMICKEN, RAMSEY &  
RUPP and

McCLURE & McClure,

Attorneys for United States Fidelity & Guaranty Company, a Corporation, Petitioner.

[Endorsed]: No. 4123. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a Corporation, Petitioner, vs. C. W. Ryan, as Trustee in Bankruptcy of the Estate of Puget Sound Engineering Company, a Corporation, Respondent. In the Matter of Puget Sound Engineering Company, a Corporation, Bankrupt. Stipulation as to Record on Review. Filed Oct. 29, 1923. F. D. Monckton, Clerk.